86-357

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellants

v.

JAMES I. SCHEINER, SECRETARY OF THE DEPARTMENT OF REVENUE, *et al.*,
Appellees

On Appeal from the Supreme Court of Pennsylvania

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether Pennsylvania's axle tax statute discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution because, by simultaneously reducing registration fees for trucks registered in the State by amounts equal to the tax, Pennsylvania has caused the tax to be borne almost entirely by trucks registered outside the State.

2. Whether Pennsylvania's axle tax statute and its predecessor marker fee statute discriminate against interstate commerce in violation of the Commerce Clause of the United States Constitution because each imposes a substantially higher effective tax on trucks registered outside the State than on trucks registered in the State.

PARTIES TO THE PROCEEDING AND RULE 28.1 STATEMENT

Appellants are plaintiff classes consisting of all interstate motor carriers whose vehicles are registered outside of Pennsylvania and who were subject to the $25 identification marker fee requirement or who will be subject to the axle tax, in addition to the following named plaintiffs:

Appellant American Trucking Associations, Inc. (ATA), is an independent corporation that has no subsidiaries or affiliates that are not wholly owned.

Appellant Astro Container Company, which has no subsidiaries or affiliates, is a division of Allied Drum Services, Inc.

Appellant Interstate Truck Leasing, Inc., which has no affiliates or subsidiaries, is a subsidiary of Fred Taylor Company, Inc.

Appellant Interstate Van Lines, Inc., is a subsidiary of I.V.L. Corp. Interstate Van Lines' affiliates or subsidiaries (other than wholly owned subsidiaries) are Ace Van & Storage Co., Inc.; A.E.M. Inc.; and Interstate International Inc.

Appellant Old Dominion Freight Line Inc. is an independent corporation whose subsidiaries and affiliates (other than wholly owned subsidiaries) are old Dominion Tank Leasing, Inc.; E & J Enterprises; Deaton, Inc.; and Road-Runners Freight System.

Appellant Tri-State Motor Transit Co. is an independent corporation whose subsidiaries and affiliates (other than wholly owned subsidiaries) are Contract Operators Accounting Service; Aero Body & Truck Equipment, Inc.; LTL Leasing Co.; Loadus Truck Leasing, Inc.; H.G.O. Rigging & Storage Inc.; LKO Leasing Co.; Central States Transportation Co.; and J.H. Rose Truck Lines Co.

Appellees are the following defendant state officials, or their successors: James I. Scheiner, Secretary of the Department of Revenue of the Commonwealth of Pennsylvania; Leroy S. Zimmerman, Attorney General of the Commonwealth of Pennsylvania; and Nicholas G. Dellacipeste, Commissioner of the State Police of the Commonwealth of Pennsylvania.

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On Appeal from the Supreme Court of Pennsylvania

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania (J.S. App. A) is reported at 509 A.2d 838. The opinions of the en banc Commonwealth Court (J.S. Apps. C, D, and E) are reported at 87 Pa. Commw. 345, 487 A.2d 468 (marker fee), 87 Pa. Commw. 379, 487 A.2d 465 (axle tax), and 87 Pa. Commw. 418, 489 A.2d 269 (marker fee refund), respectively. The opinion of the single Commonwealth Court judge in the marker fee case (J.S. App. F) is reported at 77 Pa. Commw. 575, 466 A.2d 755.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania (J.S. App. B) was entered on May 6, 1986. Notices of appeal to this Court (J.S. Apps. G, H, and I) were filed

on June 16, 1986. On July 25, 1986, Justice Brennan extended the time within which to docket the appeal to September 3, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This case involves a challenge to the validity of state statutes under the Commerce Clause of the United States Constitution. The relevant Pennsylvania statutes are set forth in J.S. App. J.

STATEMENT

At issue in this case is the constitutionality under the Commerce Clause of the United States Constitution of Pennsylvania statutes imposing two highway use taxes—an annual $25 per truck marker fee, which was in effect from 1980 to 1983, and a $36 per axle ($180 per typical, five-axle truck) tax that superseded it and remains in effect today. The axle tax statute is challenged because, by simultaneously reducing its registration fees for in-state trucks by equal amounts, Pennsylvania manipulated its tax system to place virtually the entire burden of the axle tax on operators of trucks registered outside Pennsylvania. It is appellants' submission that the axle tax, which raises approximately $68 million per year, represents a classic example of unlawful discrimination against interstate commerce.

But even if this structural discrimination were eliminated, and Pennsylvania-registered trucks were actually made to sustain the burden of the axle tax, that tax and the marker fee would still violate the Commerce Clause because they are inherently discriminatory in operation. These exactions do not vary in amount with miles traveled on Pennsylvania's highways; accordingly, their per-mile costs decline as miles driven within the State increase. Because trucks based in Pennsylvania make

substantially greater use of its highways than foreign-based trucks, the result is to impose a far higher tax per mile on the typical out-of-state trucker than on his in-state competitor.

Despite the flagrant discrimination against interstate commerce that these statutes entail, and despite a strong dissent with respect to the validity of the axle tax, both statutes were upheld by the Supreme Court of Pennsylvania.

A. The Pennsylvania Tax Statutes.

Like every other state, Pennsylvania imposes a variety of taxes and fees on users of its highways, including relatively uncontroversial ones such as registration fees for vehicles based in the State and taxes on fuel purchased or used there. The revenues from Pennsylvania's highway taxes are placed in its Motor License Fund and expended for highway construction and maintenance or other road-related purposes (J.S. App. 3a). The current controversy arises because of Pennsylvania's adoption, beginning in 1980, of new forms of highway use taxes that fall disproportionately upon out-of-state truckers—a discrimination compounded by Pennsylvania's manipulation of its tax system to relieve its own truckers of virtually the entire cost of these new taxes.

1. *The Marker Fee.* In June 1980, Title 75 of Pennsylvania's Vehicle Code was amended to increase from $2 to $25 the identification marker fee that motor carrier vehicles (*i.e.*, trucks, truck tractors, or combinations) registered outside Pennsylvania and weighing more than 17,000 pounds pay as a condition of operating on the State's highways. 75 Pa. Cons. Stat. Ann. § 2102 (Purdon 1983) (reproduced at J.S. App. 80a-81a). For trucks registered in Pennsylvania the fee was "deemed a part of and included in the vehicle registration fee." 75 Pa. Cons. Stat. Ann. § 2102(b) (Purdon 1981) (J.S.

App. 6a). The $25 marker fee was a tax for the privilege of using Pennsylvania's roads; the administrative cost associated with the issuance of the markers was stipulated to be approximately $5 per vehicle. See Joint Stipulation of Facts in No. 315 C.D. 1982, ¶¶ 1, 6. The marker fee payments generated substantial revenues. For the twelve months beginning April 1, 1981, decals were purchased for nearly 400,000 non-Pennsylvania-based trucks at a cost of approximately $10 million (R. 267, 465).[1]

2. *The Axle Tax.* By legislation (sometimes referred to as "Act 234") passed in December 1982 and effective April 1, 1983, the marker fee was reduced to $5 per year.[2] In its place, however, Act 234 instituted a much larger impost—the axle tax. 75 Pa. Cons. Stat. Ann. § 9901 *et seq.* (J.S. App. 82a-86a). This tax, which applies to trucks weighing in excess of 26,000 pounds, requires an annual payment of $36 per axle. Depending on their size, the trucks subject to the tax have between two and five axles and are therefore subject to an annual tax of from $72 to $180.[3] The axle tax raises approximately $68 million annually (J.S. App. 34a).

The stated purpose of the axle tax is "to provide for the creation of jobs and for the rehiring of [Pennsylvania's] unemployed." 75 Pa. Cons. Stat. Ann. § 9907 (b) (J.S. App. 84a). All axle tax proceeds are placed in a new Highway Bridge Improvement Restricted Ac-

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[1] "R." refers to the reproduced record filed in the Supreme Court of Pennsylvania.

[2] Because this amount reflects costs actually incurred in administering the marker (decal) system, appellants did not contest the lawfulness of the reduced fee in the Pennsylvania courts and do not do so here.

[3] A portion of the tax is rebated for vehicles that make only "incidental" use of Pennsylvania's highways. Under Section 9905 (J.S. App. 83a-84a), vehicles traveling fewer than 2,000 miles a year in Pennsylvania may obtain a rebate proportionate to their reduced mileage.

count within the Motor Vehicle Fund. The law requires that firms with Pennsylvania-based facilities be "actively solicited to make bids on contracts to furnish products and materials" to be used in projects funded by the Account (*ibid.*).

Unlike the marker fee, which had to be paid only for trucks registered outside of Pennsylvania, the axle tax on its face applies equally to Pennsylvania-based and to non-Pennsylvania-based trucks. However, the enactment that created the axle tax also provided for a simultaneous reduction in registration fees paid by Pennsylvania-based trucks subject to the axle tax. This reduction was in nearly all instances identical in amount to the axle tax.[4] The result is that the cost of the axle tax has been borne almost entirely by interstate truckers operating non-Pennsylvania-based vehicles on the State's highways, while Pennsylvania-based operators have been largely relieved of any financial burden despite their nominal obligation to pay the tax.[5]

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[4] The axle tax is, as noted, assessed on the basis of the number of a vehicle's axles. Truck registration fees, by contrast, increase with the weight of the vehicle. Compare 75 Pa. Cons. Stat. Ann. § 9902 with *id.* at § 1916(a) (J.A. App. 82a, 86a-87a). While there is a direct correlation between weight and number of axles, and while the reduction in registration fees was tied as closely as possible to the axle tax likely to be imposed on vehicles of the various weight classes, there may be a few vehicles for which the reduction in registration fee was $36 greater or less than the axle tax liability.

[5] Under the International Registration Plan ("IRP"), to which Pennsylvania and 33 other states belong, the discrimination experienced by some non-Pennsylvania-based truckers may be ameliorated to a degree by the registration fee reduction; similarly, Pennsylvania-based truckers may be unable, if they operate in other IRP states, to realize the full advantage conferred on them by the registration fee reduction. The operation of the IRP is discussed briefly by the court below at J.S. App. 5a & n.2. For the reasons explained by the dissent (*id.* at 45a-46a), the IRP is not material to the legal issues involved in this appeal.

Even apart from the reduction in registration fees, the axle tax has a disparate impact upon Pennsylvania-based and non-Pennsylvania-based vehicles. Because the axle tax is a fixed amount, its per-mile cost declines with increased use of Pennsylvania's highways. And because the average Pennsylvania-based vehicle drives many more miles on the State's highways than the typical non-Pennsylvania-based vehicle, the cost of the axle tax, like that of the marker fee that preceded it, falls disproportionately on out-of-state vehicles. Evidence introduced by ATA in the marker fee case, based principally on state tax records and responses to a survey conducted by ATA, showed that in 1981 Pennsylvania-based trucks traveled an average of nearly 26,000 miles each on the State's roads, while foreign-based trucks averaged slightly over 4,500 miles apiece. These data, which bear on the impact of the axle tax as well as the marker fee, reflect an average per-mile tax cost for vehicles registered outside of Pennsylvania that is more than 5.5 times the cost for in-state vehicles. See R. 465.[6]

B. The Proceedings Below.

The subject of this appeal is the judgment of the Supreme Court of Pennsylvania in three consolidated cases, each of which was originally brought by appellants in the Commonwealth Court.

1. The first of those cases (*"ATA I"*), brought in February 1982, challenged the validity of the marker fee statute under the Commerce Clause of the United States Constitution.[7] The statute was challenged for two

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[6] Appellees objected to the admission of these computations on hearsay and other grounds, but their objection was overruled by the Commonwealth Court. The Pennsylvania Supreme Court did not pass upon the admissibility of the evidence because it considered disparity of impact to be immaterial to the Commerce Clause analysis (see J.S. App. 28a).

[7] In the state courts, appellants also attacked the tax statutes on equal protection, uniformity, and privileges and immunities

reasons. First, because by its terms it applied only to trucks registered outside Pennsylvania, the marker fee was attacked as facially discriminatory. Second, because of its substantially disparate impact on Pennsylvania-based and non-Pennsylvania-based trucks arising from their different highway use patterns, the marker fee was challenged as discriminatory in effect. The complaint sought a declaration of invalidity of the marker fee, an injunction against its enforcement, and refunds of fees paid thereunder.

Following the certification of a plaintiff class consisting of non-Pennsylvania-based interstate motor carriers subject to the marker fee requirement (see J.S. App. 10a), the Commonwealth Court held the marker tax facially discriminatory and therefore unconstitutional under the Commerce Clause. The court based its ruling on the manner of adoption of the marker fee system, which impermissibly placed the entire burden of the tax on vehicles registered outside of Pennsylvania (J.S. App. 70a-72a). In view of that holding, the court found no need to consider appellants' contention that the fee was unconstitutional because of its discriminatory effect in terms of cost per mile (*id.* at 73a). The en banc Commonwealth Court overruled appellees' objections to these findings and also found the marker fee invalid, relying on essentially the same grounds as the initial decision (*id.* at 52a-57a).

2. The second suit (*"ATA II"*) was a class action brought by appellants in the Commonwealth Court in January 1983, on the heels of enactment of the axle tax and in advance of its effective date. On cross-motions for summary judgment, appellants prevailed before the en banc Commonwealth Court, which found the tax fa-

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grounds. Because these grounds overlap so substantially with the claims rooted in the Commerce Clause, their applicability is not separately argued herein.

cially discriminatory against interstate commerce (J.S. App. 61a):

> Examining the Axle Tax in conjunction with the simultaneously enacted registration fee reductions, we conclude that the assessment facially discriminates against interstate commerce. The registration fee reductions almost always offset assessments, virtually insulating operators of locally but not foreign registered vehicles from the levy's financial impact. Since the Axle Tax discriminatorily affects the operators of foreign-registered vehicles, who bear the full brunt of the tax, the assessment constitutes economic protectionism and is facially invalid.

Relying on *Maryland* v. *Louisiana*, 451 U.S. 725 (1981), the court declared the axle tax statute unconstitutional and, pursuant to the parties' stipulations, ordered refunds of the improperly exacted taxes (J.S. App. 61a-62a). Again, because the court found the tax facially discriminatory, it did not consider the challenge based on discriminatory effect (*id.* at 62a n.4).

3. The final action ("*ATA III*"), filed by appellants in January 1984, sought a refund of marker fees paid between August 1980 and March 1982—relief that appellants had inadvertently neglected to demand in *ATA I*. Appellees filed preliminary objections to the jurisdiction of the Commonwealth Court, claiming that appellants were obliged to exhaust their administrative refund remedy before the Board of Finance and Revenue prior to seeking judicial relief. The en banc Commonwealth Court sustained the objections to its jurisdiction. J.S. App. E.

4. The losing parties in each of the three cases appealed to the Supreme Court of Pennsylvania, which, in a split decision, reversed the lower court and upheld the constitutionality of both the marker fee and the axle tax statutes. J.S. App. A.

The court first considered whether the marker fee was facially discriminatory and concluded, after reviewing the language and history of the enactment, that it was not (J.S. App. 22a-24a). It then turned to the argument that the marker fee was discriminatory in operation because, not being proportioned to the extent of highway use, it imposed higher per-mile costs on trucks registered outside of Pennsylvania (which generally make substantially less use of its highways) than on trucks registered in the State. The court viewed this contention as raising an objection under the "fourth facet" of the test set forth in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977), *i.e.*, whether the fee is "fairly related" to the services provided by the State (J.S. App. 24a).[8] Because of the high costs of maintaining Pensylvania's highways, the court found that the marker fee was not excessive or manifestly disproportionate and therefore was "fairly related" to the highway construction and maintenance services provided by the State to out-of-state vehicles (*id.* at 29a). The court further explained (*id.* at 28a) (emphasis in original; footnote omitted):

> [T]he fact that a flat tax imposed upon all commerce, interstate and local alike, *may* have a greater impact upon interstate commerce, *if* such commerce actually uses the services or facilities less than local commerce, is inconsequential to our Commerce Clause analysis. Interstate motor carriers are free to use the Commonwealth's highways as often and for whatever distances they wish and cannot be heard to complain that, because they choose to use those highways less frequently than motor carriers whose vehicles are registered in Pennsylvania *may* use them, the burden of the flat fee falls too heavily upon them.

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[8] The court noted (J.S. App. 25a n.15) that appellants also challenged the discriminatory effect of the marker fee under the third prong of the *Complete Auto* test, which condemns state taxes that discriminate against interstate commerce.

Turning next to the axle tax, the court acknowledged the simultaneous reduction of registration fees that accompanied enactment of the tax and characterized the discrimination argument as "[a]t first blush . . . appealing" (J.S. App. 31a). Nevertheless, it agreed with the State that the arrangement under which the burden of the tax fell almost entirely on out-of-state truckers was defensible as a "rational restructuring" of tax obligations (*ibid.*). The court stated that it "need go no further" (*id.* at 32a) than a comparison of the axle tax to the much higher registration fees, which it believed demonstrated that vehicles registered in Pennsylvania still were required to pay more for the privilege of using the State's highways than were their non-Pennsylvania counterparts (*id.* at 33a):

> [C]onsidered in conjunction with all other provisions of Pennsylvania's highway user fee system, [the axle tax] works no discrimination against interstate commerce in practical operation. It is entirely proper for a state to enact a compensatory tax to neutralize or partially offset an economic advantage previously enjoyed by interstate commerce to the disadvantage of local commerce that was caused by operation of that state's taxing scheme.

The court observed that the revenues generated by the axle tax—approximately $68 million in fiscal 1983-84—were less than the expenditures on bridge maintenance and improvement to which the tax proceeds are statutorily committed (J.S. App. 34a), and that any discriminatory or protectionist motive the legislature may have held is immaterial if the tax is otherwise lawful (*id.* at 34a-35a).[9]

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[9] Finally, the court concluded that the other constitutional challenges to the marker fee and the axle tax were effectively disposed of by the finding that the taxes do not discriminate against interstate commerce, and that its disposition of the merits in *ATA I* and *ATA II* made it unnecessary to resolve the jurisdictional issue in *ATA III*. J.A. App. 35a-36a.

Two justices dissented with respect to the constitutionality of the axle tax. In an opinion by Chief Justice Nix, they concluded that the axle tax violated the Commerce Clause because its burden fell almost entirely upon non-Pennsylvania-based truckers. The dissent first noted (J.S. App. 39a) that it is "incumbent upon the reviewing court to determine whether the challenged statute, in practical operation, works discrimination against interstate commerce in purpose or effect." Doing so, the dissent concluded (*id.* at 41a) that the reductions in registration fees that accompanied adoption of the axle tax gave that tax an "unequal financial impact" that facially discriminated against interstate commerce. The dissent further observed (*ibid.*) that "there is nothing in the statute itself or in the circumstances surrounding [its] enactment" to support the court's conclusion that the statute was intended to effect a "rational restructuring" of tax burdens; instead, the expressed purpose was the parochial one of providing jobs for Pennsylvania's unemployed.

The dissent also explained the fallacy of the pivotal part of the court's holding—that any discrimination in the imposition of the axle tax is justified by the supposition that it merely compensates for registration fees, which are paid only by locally-based trucks (J.S. App. 44a-45a) (emphasis in original; footnote omitted):

> What the majority ignores, however, is that every state maintains a system for registering trucks and every state imposes fees and taxes in conjunction with such registration. . . . The practical operation of Act 234, which does not restructure the entire Pennsylvania user fee system, does not serve to achieve equal treatment[;] rather it serves instead to shift an additional financial burden *only* upon interstate commerce. The protectionist nature of this legislation is evident and cannot be ignored. Should every state impose such a tax to burden only out-of-state registered vehicles, the impact upon interstate commerce would indeed be crippling.

THE QUESTION IS SUBSTANTIAL

The instant appeal brings before this Court two important questions concerning the limitations imposed by the Commerce Clause on the taxing powers of the states. The first of these involves an issue that has produced a square conflict between the decision below and a decision earlier this year by the Supreme Court of Vermont; moreover, the central proposition on which the decision below rests has been squarely and unequivocally rejected by the highest courts of Maine and New Hampshire. In addition to being important in their own right, the issues are part of an emerging pattern of state taxation of interstate truckers that raises problems ripe for consideration by this Court.

The decade of the 1980's has seen an upsurge in discriminatory state highway tax legislation designed to favor operations of trucks registered in the taxing state over out-of-state operators. The first of these was the Pennsylvania marker fee challenged in this case, which was enacted in 1980. This was followed in 1981 by a Vermont enactment taxing trucks registered outside Vermont $40 per year plus $15 for each entry into that State, a Connecticut law raising its fuel marker fee for out-of-state trucks from $5 to $40, and a Maine statute requiring out-of-state trucks to pay a $50 annual highway use fee; in 1982 by Vermont and Maryland fuel marker taxes of $50 and $25 per truck, respectively; in 1983 by Arkansas' $175 highway use equalization tax on large trucks [10] and Pennsylvania's axle tax; in 1984 by New Jersey's $25 marker fee; in 1985 by a flat Indiana supplemental highway user fee of $50; and in 1986 by Kentucky's adoption of a $150-$200 highway user tax

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[10] The Arkansas tax is the subject of a separate appeal to this Court. See *American Trucking Associations, Inc.* v. *Gray*, 709 S.W.2d 410 (Ark. 1986), appeal docketed, No. 86- (Sept. 3, 1986). Copies of the Jurisdictional Statement in that case have been served on counsel for appellees.

on large trucks.[11] The amounts of money such taxes exact from interstate motor carriers are substantial. The Pennsylvania axle tax, for example, generated an estimated $68 million in fiscal 1983 alone (J.S. App. 34a).

These states have utilized two separate mechanisms to shift a disproportionate share of the burden of their highway use taxes from their own domiciliaries to out-of-state operators. The first involves outright discrimination in the design of the tax. Some taxes by their terms apply only to trucks registered outside the state or impose a higher tax on such trucks than on in-state trucks. For example, the Maine law described above required payment of a $40 annual highway use tax by out-of-state trucks, while requiring Maine-registered trucks to pay no more than $3. See *American Trucking Associations, Inc.* v. *Quinn*, 437 A.2d 623 (Me. 1981). Only slightly more subtle is Pennsylvania's manipulation of its tax system, imposing what appears to be a facially neutral axle tax while simultaneously providing offsetting reductions in registration fees to Pennsylvania-based truckers.

The second mechanism for discrimination is the adoption of flat taxes that are paid by both in-state and out-of-state truckers but that in fact favor local truckers because of their disparate cost-per-mile impact on the two classes.[12] Pennsylvania's marker fee and axle tax both

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[11] Appendix K provides a state-by-state summary of discriminatory and retaliatory taxes now in effect or recently invalidated by the courts, as well as of pending litigation challenging such taxes.

[12] Many of the discriminatory taxes of this type are not, strictly speaking, pure flat taxes—*i.e.*, taxes of fixed amount regardless of the extent of highway use. In the case of Pennsylvania, the $25 marker fee is a pure flat tax, but the axle tax is proportional for the first 2,000 miles of highway use. For example, in the case of a five-axle truck, for which the maximum tax is $180 per year, the tax is perhaps most accurately described as being at a rate of

possess these attributes. Because such flat taxes are not proportional to the extent of a vehicle's highway use within the taxing state, they impose per-mile costs that are much lower for heavy users of the highways than for less frequent users. And the heavy users with low per-mile tax costs are principally in-state operators—as the ATA study introduced in evidence demonstrated (see page 6, *supra*).

Conversely, interstate truckers based outside Pennsylvania tend to use its highways less and to suffer substantially higher tax costs per mile. The cumulative problems that widespread adoption of such taxes (and seven states already have them) create for businesses that operate in many states can readily be imagined; they are discussed in more detail at pages 18-19 of the Jurisdictional Statement in *American Trucking Associations, Inc.* v. *Gray* (see note 10, *supra*).

These taxes not only burden interstate commerce directly but also multiply the discriminations it suffers by precipitating retaliatory, mirror-image taxes in other states. Some 22 states have enacted statutes empowering their revenue or highway officials to retaliate against states that have discriminatory or unconventional taxes by imposing on trucks registered in those states the same taxes that the target states impose on the retaliating state's trucks. Eight states—Florida, Georgia, Maine, Nebraska, New Hampshire, New Jersey, Oklahoma, and Vermont—have already exercised this authority and retaliated specifically against Pennsylvania truckers on ac-

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9¢ per mile for the first 2,000 miles, with no further tax for additional highway use, no matter how extensive.

While some of these discriminatory state highway tax schemes thus have mechanisms to permit light users to pay somewhat less in absolute terms, the dominant feature of all of them is the ability of heavy users to obtain markedly lower per-mile tax costs. The expression "flat tax" or "non-proportional tax" is used herein to denominate taxes that have this attribute.

count of the axle tax. See J.S. App. K. This is precisely the kind of trade war that the Commerce Clause was meant to foreclose. See *Nippert* v. *Richmond*, 327 U.S. 416, 434 (1946).

The interstate trucking industry is more than willing to shoulder its share of the costs of maintaining the states' highway systems by paying taxes and fees that fairly apportion responsibility for wear and tear to those highways. But it objects to the kind of parochial and protectionist legislation reflected in the array of state laws described above. Because of such parochial legislation, the legality of discriminatory highway use taxes is an issue of substantial and growing national importance that demands the attention of this Court.[13] Moreover, as we show in the argument that follows, the Pennsylvania marker fee and axle tax are plainly unconstitutional. Indeed, the highest courts of Maine, New Hampshire, and Vermont have invalidated similar or identical highway use statutes under the Commerce Clause.

A. The Axle Tax Is Structured To Discriminate Against Trucks Registered In States Other Than Pennsylvania.

As recounted in the Statement, when Pennsylvania adopted the axle tax, which on its face appears to apply equally to Pennsylvania-based and out-of-state vehicles, it simultaneously reduced registration fees for in-state vehicles by the identical amount. See page 5, *supra*. As a result, beginning in April 1983, the owner of a vehicle registered in New York who wished to engage in interstate commerce on Pennsylvania's highways had to pay a new tax of $36 per axle for the privilege. If the same vehicle were registered in Pennsylvania, how-

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[13] An appeal is being taken simultaneously herewith from a decision by the Supreme Court of Arkansas sustaining that State's Highway Use Equalization tax, another tax not proportioned to highway use and thus discriminatory in operation. See note 10, *supra*, and pages 24-25, *infra*.

ever, it would not have had to pay a penny more to Pennsylvania in order to conduct identical operations on the same highways.

The court below acknowledged (J.S. App. 30a-31a) this feature of the axle tax legislation and the State's concession that the legislature "intended to lessen the burden imposed upon 'local commerce'" (*id. at* 31a) when it gave offsetting registration fee reductions to local truckers. It nevertheless held (*id.* at 31a-34a) that it was permissible to impose the new tax solely upon non-Pennsylvania-registered trucks because the total Pennsylvania tax and fee burden on in-state trucks purportedly remained substantially greater than that on out-of-state trucks. In so ruling, the court placed itself in conflict with decisions of the highest courts of several states and with basic principles of Commerce Clause jurisprudence.

1. *The Decision of the Pennsylvania Supreme Court Conflicts With Decisions of Other State Supreme Courts.*

Shortly before Pennsylvania enacted the axle tax, Vermont engaged in the same kind of "restructuring" of its tax system. In 1982, it adopted a $50 annual fuel user's license fee that was nominally applicable to all trucks whether based within or outside Vermont, but as part of that legislative package it reduced registration fees for Vermont truckers by the same $50 amount. See Vt. Stat. Ann. tit. 23, §§ 367(a), 415, 3007, 3010 (Supp. 1982).[14]

Appellant ATA instituted class actions in both Vermont and Pennsylvania challenging these manipulations of the States' tax systems on the ground that they discriminated unconstitutionally against interstate commerce

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[14] This statute replaced a system of entry fees imposed exclusively on out-of-state vehicles. See J.S. App. 92a.

by imposing a tax that effectively applied only to out-of-state trucks. Within three months of one another, the Supreme Court of Vermont sustained ATA's constitutional challenge (*American Trucking Associations, Inc.* v. *Conway*, 508 A.2d 408 (1986)), while the Supreme Court of Pennsylvania rejected the identical legal claim in the decision that is the subject of the instant appeal.[15]

The Vermont Supreme Court unequivocally recognized in *Conway* that statutory legerdemain of the kind challenged in both cases "discriminate[s] against interstate commerce by providing a direct commercial advantage to [local] truckers" (508 A.2d at 412). It also explained why the central postulate of the Pennsylvania Supreme Court's analysis—that registration fees "complement" and therefore offset highway user fees—is incorrect and cannot justify the blatant discrimination (*id.* at 412-413). To the same effect are the holdings of the Maine Supreme Judicial Court (*American Trucking Associations, Inc.* v. *Quinn*, 437 A.2d 623, 626-27 (1981)) and the New Hampshire Supreme Court (*Private Truck Council of America, Inc.* v. *New Hampshire*, No. 86-088 (August 12, 1986)),[16] the latter court noted (slip op. 4) that its decision was contrary to that of the Pennsylvania Supreme Court in this case.[17]

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[15] ATA has petitioned for a writ of certiorari to review the portion of the holding in *Conway* refusing to order a refund of the taxes held to have been unconstitutionally exacted. No. 86-69 (filed July 21, 1986). Copies of that petition have been sent to appellees' counsel. Vermont has filed a conditional cross-petition in response (No. 86-276, filed Aug. 22, 1986), raising the same Commerce Clause issue regarding the fuel user's license fee as we raise here with respect to the axle tax and noting the conflict in decisions between *Conway* and the instant case.

[16] Copies of this opinion are being lodged with the Clerk of this Court and served on counsel for appellees.

[17] This point is discussed more fully at pages 21-24, *infra*.

This conflict among state supreme courts on a constitutional question of substantial practical importance demands resolution by this Court. See Sup. Ct. R. 17.1(b); *Fuller* v. *Oregon*, 417 U.S. 40, 42 & n.3 (1974).

2. *The Decision Below Misapplies This Court's Commerce Clause Jurisprudence.*

The decision below cannot be squared with fundamental principles of Commerce Clause jurisprudence. The Court recognized in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), that a state may impose taxes upon interstate commerce, which can be made to pay its fair share for use of state tax-supported facilities and services. But *Complete Auto* also strictly cabined this power, ruling that taxes imposed on interstate commerce must be fairly related to activities within and services provided by the taxing state and must not discriminate against interstate commerce. This principle was summarized in *Maryland* v. *Louisiana*, 451 U.S. 725, 754 (1981):

> One of the fundamental principles of Commerce Clause jurisprudence is that no State, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959). See *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977). This antidiscrimination principle "follows inexorably from the basic purpose of the Clause" to prohibit the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution. *Boston Stock Exchange*, *supra*. See *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951).

The most obvious type of impermissible discrimination against interstate commerce is a tax or charge that on its face applies solely to the activities of businesses domi-

ciled outside the taxing state or exempts from its reach some or all locally based activity. Except in narrowly limited circumstances in which a facially discriminatory tax can be found to "compensate" for an equivalent tax that is applied exclusively to in-state transactions or domiciliaries (see pages 21-24, *infra*), such a tax is prohibited. See, *e.g.*, *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984); *Armco Inc.* v. *Hardesty*, 467 U.S. 638 (1984); *Westinghouse Electric Corp.* v. *Tully*, 466 U.S. 388 (1984).

The principle that a facially discriminatory state tax violates the Commerce Clause has regularly been applied by state and federal courts to invalidate taxes imposed on interstate trucking. In *American Trucking Associations, Inc.* v. *Conway*, 508 A.2d 405 (Vt. 1986), petitions for cert. filed, Nos. 86-69 and 86-276, 55 U.S.L.W. 3032 (U.S., July 21 and Aug. 22, 1986), the Supreme Court of Vermont struck down a system of entry fees imposed solely on trucks registered outside Vermont, finding them to be placed impermissibly "at a competitive disadvantage" (*id.* at 407) by the tax. In *American Trucking Associations, Inc.* v. *Quinn*, *supra*, the Maine Supreme Judicial Court found "egregious discrimination against interstate commerce" (437 A.2d at 627) in a Maine statute requiring operators of out-of-state trucks to pay a highway use fee of $40 annually when their Maine counterparts were either exempted entirely or subjected to a fee of only $3. In *American Trucking Associations, Inc.* v. *O'Neill*, 522 F.Supp. 49 (D. Conn. 1981), the district court preliminarily enjoined a $40 fuel marker tax that applied exclusively to vehicles registered outside Connecticut. In *Private Truck Council of America, Inc.* v. *New Hampshire*, *supra*, the Supreme Court of New Hampshire held unconstitutional a system of retaliatory taxes imposed against trucks registered in certain other states (including Pennsylvania because of its axle tax). In *Private Truck Council of America, Inc.* v. *Secretary of State*, 503 A.2d 214 (Me.), cert. denied, 106 S.Ct. 1997

(1986), the Supreme Judicial Court of Maine struck down a system of selective "reciprocal taxes." See also *Huie* v. *Private Truck Council of America, Inc.*, 466 N.E. 2d 435 (Ind. 1984).

Of course, Pennsylvania's axle tax is by its terms applicable to all trucks weighing more than 26,000 pounds, wherever registered. But it is settled that a claim of discrimination cannot be rebutted by consideration of a single statutory provision in isolation. "A state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme." *Maryland* v. *Louisiana*, 451 U.S. at 756. In that case, Louisiana's first use tax on natural gas was found to discriminate unlawfully against interstate commerce because, as the result of various credits and exclusions, local producers and consumers were effectively exempted from the tax (*id.* at 756-758). Here, the same enactment that created the axle tax (Act 234) simultaneously made equal reductions in registration fees for Pennsylvania vehicles subject to the new tax (see J.S. App. 39a-41a), resulting in a scheme that, viewed as a whole, taxes non-Pennsylvania domiciliaries while sheltering local interests. Such a scheme is indistinguishable under the Commerce Clause from one in which the axle tax is imposed solely on out-of-state vehicles.

3. *The Discrimination Produced by Manipulation of Pennsylvania's Registration Fees Cannot Be Justified Under the Compensatory Tax Doctrine.*

The Supreme Court of Pennsylvania did not dispute the premise that the manipulation of registration fees accompanying adoption of the axle tax amounted to imposing the latter only upon interstate commerce (see J.S. App. 30a-31a). Rather, it misconstrued the above-described principle of *Maryland* v. *Louisiana* by asserting that consideration of the entire Pennsylvania scheme of fees and taxes showed that the State was justified in

effectively imposing the new tax only on out-of-state vehicles (*id.* at 31a-32a). In particular, the court posited that vehicles based in Pennsylvania must pay not only the axle tax but also a registration fee that, even after being reduced to neutralize the effect of the axle tax, remains substantially larger than any payment made directly to Pennsylvania by operators of out-of-state vehicles.

In support of its conclusion, the court below cited several decisions of this Court applying what is known as the "compensatory" or "complementary" tax doctrine, under which state taxes imposed only on interstate commerce may be sustained if legally equivalent to other taxes imposed only on in-state interests (J.S. App. 33a-34a). As recognized by the dissent and by three other state supreme courts that have considered similar arguments, the conclusion that discriminatory highway use taxes can be saved by reference to registration fees paid by locally-based vehicles is riddled with errors.

a. The principal flaw arises from an apparent misunderstanding about the nature and function of vehicle registration fees. As Chief Justice Nix pointed out in dissent (J.A. App. 44a):

> What the majority ignores . . . is that every state maintains a system for registering trucks and every state imposes fees and taxes in conjunction with such registration. Just as Pennsylvania-registered vehicles pay a registration fee to the state of Pennsylvania, so do out-of-state registered vehicles pay such a fee in their respective jurisdictions.

Moreover, by virtue of reciprocity agreements entered into among the states, including Pennsylvania, the registration fee paid to Pennsylvania by its domiciliary vehicles purchases the right to operate those vehicles in other states; conversely, trucks registered outside Pennsylvania have thereby acquired the right to operate in Pennsylvania (see J.S. App. 88a-91a). Thus, while Pennsylvania may still tax the use of its highways to defray the

costs of maintenance, what is covered by the registration fee—access to highways in the many states with which Pennsylvania has reciprocity arrangements—is not a "substantially equivalent event" (see *Maryland* v. *Louisiana*, 451 U.S. at 759; *Armco Inc.*, 467 U.S. at 643) to Pennsylvania highway use. It is precisely this point that caused the highest courts of New Hampshire, Vermont, and Maine to reject the contention that registration fees could be held to complement or compensate for otherwise discriminatory highway use charges. See *Private Truck Council of America, Inc.* v. *New Hampshire*, *supra*, slip op. 4 ("[r]egistration fees for resident vehicles cannot be compensated for by taxes imposed against out-of-state vehicles because all vehicles pay registration fees in their own states, which entitle them to operate in all states with registration reciprocity"); *American Trucking Associations, Inc.* v. *Conway*, 508 A.2d at 412-413; *American Trucking Associations, Inc.* v. *Quinn*, 437 A.2d at 626-627.

b. Even if registration fees could in appropriate circumstances be considered complementary to highway use taxes, the requisites for such equivalence are entirely lacking here. Plainly, the mere fact that registration fees are substantially larger than the axle tax, on which the Pennsylvania Supreme Court placed heavy emphasis, is of no consequence. See *Armco Inc.*, 467 U.S. at 642-643 (holding that a manufacturing tax was not complementary even though far higher than the wholesaling tax); *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenues*, 460 U.S. 575 (1983) (holding that Minnesota's valid general sales tax, though considerably greater, was not complementary to a paper and ink tax found to discriminate in violation of the First Amendment). Moreover, the court could not point to anything in the history of the axle tax legislation to support the conclusion that its provisions were the product of an effort by the legislature to accomplish a "rational restructuring" of Pennsylvania's highway tax burdens. The leg-

islative history is barren of *any* economic analysis showing that out-of-state truckers were in fact bearing less than their fair share of highway costs under the previously existing tax system. Nor does it reflect *any* consideration of the structure and size of adjustments needed to equalize burdens.[18]

In addition, it is not consistent with Commerce Clause requirements to permit state courts to rationalize discriminations against interstate commerce on a post hoc basis. The legislature did not designate what portion of the registration fee is allotted to highway use within Pennsylvania, and this Court, in reviewing the constitutionality of the tax, would have no way of answering that question. See *Armco Inc.*, 467 U.S. at 643 ("[m]anufacturing frequently entails selling in the State, but we cannot say which portion of the manufacturing tax is attributable to manufacturing, and which portion to sales"). Under these circumstances, Chief Justice Nix's conclusion was surely correct (J.S. App. 45a) (emphasis in original; footnotes omitted):

> The practical operation of Act 234, which does not restructure the entire Pennsylvania user fee system, does not serve to achieve equal treatment[;] rather it serves instead to shift an additional financial burden *only* upon interstate commerce. The protectionist nature of this legislation is evident and cannot be ignored.

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[18] In fact, there is strong evidence that the "rational restructuring" justification is a fiction. Registration fees were not reduced across the board for Pennsylvania-based trucks, which should have been done if the reductions that were made truly reflected a determination that local commerce was burdened with an excessive share of highway costs. Rather, fees were reduced only for vehicles weighing more than 26,000 pounds—the group to which the new axle tax was being applied. The result of this "rational restructuring" was that, although registration fees ordinarily increase with truck weight, the $270 registration fee for Class 8 vehicles (21,000-26,000 pounds) is higher than the $243 fee for Class 9 vehicles (26,001-30,000 pounds). 75 Pa. Cons. Stat. Ann. § 1916(a) (J.S. App. 87a).

In the absence of clear evidence of an actual compensatory purpose, and of a carefully measured complementary effect, a tax paid by each business in its state of domicile cannot be held to justify an otherwise discriminatory tax imposed solely on interstate commerce. The Pennsylvania Supreme Court stands alone in upholding this kind of facially discriminatory highway use tax scheme against Commerce Clause attack. Its decision demands plenary review by this Court.

B. The Axle Tax And The Marker Fee Impermissibly Favor Local Over Interstate Commerce Because They Are Not Proportioned To Amount Of Highway Use.

Even if the structurally discriminatory feature of the axle tax were eliminated, both it and the marker fee that preceded it would still be constitutionally objectionable because they discriminate in practical effect against vehicles registered outside Pennsylvania. Both taxes have as their purpose compensation for wear and tear to the State's highways caused by the operation of large trucks. The marker fee was a flat $25 per year, whether the vehicle drove 100 miles or 100,000 miles in Pennsylvania. Likewise, the axle tax, while apportioned for the first 2,000 miles of highway use, does not increase with further operations and therefore also produces dramatically lower per-mile costs for heavy users of the highways than for less frequent users. There is no fair relation between this method of taxation and the wear and tear to the highways that interstate commerce causes. Each of the taxes accordingly offends the Commerce Clause by failing both the anti-discrimination (third prong) and the fair relationship (fourth prong) requirements of the *Complete Auto* test.

The issue of discriminatory effect in this case is virtually indistinguishable from that presented by the appeal in *American Trucking Associations, Inc.* v. *Gray*, 709 S.W.2d 410 (Ark. 1986), appeal docketed, No. 86-—— (Sept. 3, 1986). In both cases the record demonstrates

that flat or non-proportional taxes confer substantial advantages on in-state vehicles over their out-of-state competitors, because the former generally make much greater use of the highways in their home state and therefore are able to reduce their per-mile tax costs well below those of the latter. Like *Gray*, this case also demonstrates that it is entirely feasible to utilize methods of taxation that are reasonably apportioned to the activity or service generating the tax.

The Jurisdictional Statement in *Gray* fully explains the reasons why plenary review of the constitutionality of flat or non-proportional highway use taxes is warranted. We rely on those arguments in support of review in this case.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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APPENDICES

APPENDIX A

SUPREME COURT OF PENNSYLVANIA

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellees,

v.

JAMES I. SCHEINER, SECRETARY OF THE DEPARTMENT OF REVENUE, *et al.*,
Appellants.
(Two Cases)

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellants.

v.

JAMES I. SCHEINER, SECRETARY OF THE DEPARTMENT OF REVENUE, *et al.*,
Appellees,

Argued Sept. 17, 1985

Decided May 6, 1986

Before NIX, C.J., and LARSEN, FLAHERTY, McDERMOTT, HUTCHINSON, ZAPPALA and PAPADAKOS, JJ.

OPINION OF THE COURT

LARSEN, Justice.*

On September 17, 1985, this Court heard oral argument in these three related appeals which arise from class action suits challenging the constitutionality of certain highway user fees and taxes imposed by the Com-

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* This case was reassigned to this writer on March 12, 1986.

monwealth of Pennsylvania upon interstate motor carriers whose vehicles travel upon Pennsylvania roads, highways and bridges. To place these constitutional challenges in proper perspective, it is necessary and beneficial to first provide an overview of the salient provisions of our Vehicle Code, 75 Pa.C.S.A. §§ 101-9910 and taxing statutes.

I

PENNSYLVANIA HIGHWAY USER FEES

A. OVERVIEW

Our General Assembly has enacted a comprehensive and highly complex system of highway user fees, charges and taxes (hereinafter referred to as "highway user fees") designed to partially reimburse the Commonwealth of Pennsylvania for expenditures made for maintenance, construction and restoration of our extensive system of interstate highways, roads and bridges, and for expenditures made for the administration and enforcement of our Vehicle Code which governs all aspects of the use of our highways (*e.g.*, safety, vehicle characteristics, registration and licensing, regulations concerning the operation of motor vehicles, etc.). Given that the Commonwealth of Pennsylvania is a major thruway for interstate commerce along the northeast corridor, and given its hilly terrain and frequently severe weather conditions which accelerate roadway and bridge deterioration in combination with heavy use by large tractors and trailers engaged in interstate commerce, these expenditures are, of course, enormous.

Pennsylvania's highway user fees include the following:

(a) truck and truck-tractor registration fees;

(b) trailer registration fees;

(c) truck and truck-tractor title fees;

(d) trailer title fees;

(e) registration transfer fees;

(f) special handling permit fees;

(g) special trip permit fees;

(h) Fuel Use Tax;

(i) Motor Carriers Road Tax;

(j) Oil Company Franchise Tax;

(k) Gross Receipts Tax (on vehicles traveling interstate);

(*l*) Liquid Fuels Tax;

(m) farm truck registration fees.[1]

As will be explained more fully, certain of these highway user fees (such as registration fees and titles) are "fixed" while others such as the Liquid Fuels Tax, the Fuel Use Tax and the Motor Carriers Road Tax, *see* note 1, *supra*) are related to and dependent upon a motor carrier vehicle's actual use of Pennsylvania highways. All of the various highway user fees are "credited to the Motor License Fund and expended exclusively for road-related purposes." Joint Stipulation of Facts (hereinafter "JSF") at No. 315 C.D. 1982, No. 11 M.D. Appeal Docket 1985, para. 64.

Owners of motor vehicles that are based in Pennsylvania must register those vehicles with the Department of Transportation and must pay the registration fee applicable to the particular type of vehicle. 75 Pa.C.S.A.

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[1] Joint Stipulation of Facts (hereinafter "JSF") at No. 315 C.D. 1982, No. 11 M.D. Appeal Docket 1985, paras. 64, 65-98. *See* the Vehicle Code, 75 Pa. C.S.A. Chapters 13 (Registration of Vehicles), 19 (Fees) and 95 (Taxes for Highway Maintenance and Construction), and the Fiscal Code, Pa. Stat. Ann. tit. 72, §§ 2611a-2611z (Tax on Liquid Fuels), §§ 2614.1-2614.24 (Fuel Use Tax), §§ 2617.1-2617.26 (Motor Carriers Road Tax).

Chapter 13 (Registration) and Chapter 19 B (Registration Fees). These registration fees are paid by owners of Pennsylvania-registered vehicles in addition to the other various highway user fees outlined above.

The complexity of a state's scheme for imposition and collection of highway user fees is greatly compounded by the very nature of the interstate highway system and its use by motor vehicles registered in all of the United States and foreign countries with each jurisdiction generally having its own registration fees and other taxes applicable to those vehicles. In light of this multiplicity of sovereign interests, the General Assembly has declared:

> It is the policy of this Commonwealth to promote and encourage the fullest possible use of its highway system by authorizing the making and execution of reciprocal agreements, arrangements and declarations with other states, provinces, territories and countries with respect to drivers, licensed and vehicles registered in this and other states, provinces, territories and countries, thus contributing to the economic and social development and growth of this Commonwealth.

75 Pa.C.S.A. § 6141, Declaration of policy. *See* 75 Pa. C.S.A. §§ 6141-6153, Chapter 61, subchapter C, (Reciprocity). The Secretary of the Department of Transportation is authorized to execute agreements or arrangements with other jurisdictions granting to "drivers or vehicles or owners of vehicles properly licensed or registered in those jurisdictions . . . benefits, privileges and exemptions from the payment . . . of any taxes, fees or other charges" imposed upon Pennsylvania drivers, vehicles and owners provided that "drivers or vehicles properly licensed or registered in this Commonwealth . . . shall receive exemptions, benefits and privileges of a similar kind or to a similar degree as are extended to drivers or vehicles properly licensed or registered in . . ." the other

jurisdiction. 75 Pa.C.S.A. § 6143. It is further provided in that section that:

> Each agreement or arrangement shall, in the judgment of the secretary, be in the best interest of this Commonwealth and the citizens thereof and shall be fair and equitable to this Commonwealth and the citizens thereof, and shall be determined on the basis and recognition of the benefits which accrue to the economy of this Commonwealth from the uninterrupted flow of commerce.

Prior to September, 1982, Pennsylvania had entered into bilateral Apportioned Registration Agreements with twenty-three states and provinces, which agreements were based upon the International Registration Plan (hereinafter the "IRP"). On September 15, 1982, Pennsylvania became a member jurisdiction of the IRP. Under both the former bilateral agreements and the IRP, registration fees for "apportionable vehicles" were/are determined: by dividing the in-jurisdiction miles by the total miles during the preceding year to produce a fraction; (2) by determining the total fee required under the laws of each jurisdiction for full registration of each vehicle; and (3) by multiplying the total fee for each state by the fraction of in-jurisdiction miles to total miles. JSF para. 102.[2] No state which is contiguous to Pennsylvania was an IRP member at times relevant to these appeals.

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[2] For example, assuming a motor carrier vehicle based in any IRP state traveled 50% of its miles in the Commonwealth, 40% in state A, and 10% in state B, and assuming the full registration fees for those states were $400, $300, and $200 respectively, the registration fees paid by that vehicle would be as follows (if states A and B are IRP-member jurisdictions):

To Pennsylvania:	50% × $400 =	$200
To state A:	40% × $300 =	$120
To state B:	10% × $200 =	$ 20
Total registration fee:		$340

JSF at para. 103.

B. THE MARKER DECAL FEE AND ACT 68

The Act of June 18, 1980, P.L. 229, No. (hereinafter Act 68) amended the Vehicle Code by adding chapter 21, Motor Carriers Road Tax Identification Markers, which operated in conjunction with the Motor Carriers Road Tax Act. 75 Pa.C.S.A. § 2101-2105, as amended. The latter Act, part of the Fiscal Code, taxes liquid fuels purchased outside the Commonwealth but consumed while traveling within it. 72 P.S. §§ 2617.1-2617.26. Act 68 requires every motor carrier vehicle[8] operating in Pennsylvania to display an identification marker to be issued by the Department of Revenue upon payment of a fee. Purchase of the identification marker decal notifies the Commonwealth that the motor carrier vehicle is subject to the Road Tax Act and triggers that Act's reporting, record-keeping and tax-paying requirements. Pennsylvania-registered motor carrier vehicles are not required to bear these marker decals because the act of registration notifies the Commonwealth that the vehicle is subject to the Road Tax Act and the Pennsylvania license plate provides the identification marker necessary to facilitate enforcement. § 2102(d)(1).

Act 68 further provided:

> 2102(b) Fee.—The fee for issuance of an identification marker shall be $25, except that for vehicles registered in this Commonwealth, the vehicle identification marker fee shall be deemed a part of and included in the vehicle registration fee.

This fee is a "tax for the privilege of using Pennsylvania roads." JSF para. 1. The administrative costs associated with the issuance of the marker decal are approximately $5.00; the balance of the marker fee is credited to the

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[8] Act 68 defined "motor carrier vehicle" as "A truck, truck tractor or combination having a gross weight or registered weight in excess of 17,000 pounds."

Motor License Fund and expended for road-related purposes such as highway maintenance, construction, state police operations and construction bond debt service. JSF paras. 4, 5 and 46.

Section 2 of Act 68 also simultaneously amended section 1916(a) of the Vehicle Code and increased registration fees for all Pennsylvania-registered motor carrier vehicles. The smallest registration fee increase was $45.00 (for Class 7 vehicles, or motor carrier vehicles with "gross or combination weight" of 17,000-21,000 pounds), graduating upward to $228.00 (for Class 20 vehicles, or motor carrier vehicles with "gross or combination weight" of 68,001-73,280 pounds). In every case, therefore, the registration fee increase exceeded the amount of the marker fee ($25.00).

Act 68 further provided that operation of a motor carrier vehicle in Pennsylvania without an identification marker was unlawful unless exempted by regulation or unless a five-day permit had been obtained for a $5.00 fee where enforcement of the identification marker decal provisions "would cause undue delay and hardship in the operation of such motor carrier vehicle or vehicles." 75 Pa.C.S.A. § 2102(d).

C. THE AXLE TAX AND ACT 234

The Act of December 8, 1982, P.L. 842, No. 234 (hereinafter "Act 234") added Chapter 99, Axle Tax for Highway Bridge Improvement, to the Vehicle Code. 75 Pa.C.S.A. § 9901-9910, as amended. Act 234 also amended section 2102(b) by reducing the marker fee to $5.00 as of March 31, 1983.[4] 75 Pa.C.S.A. § 2102(b).

Act 234 imposed an axle tax upon all motor carriers[5] as follows:

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[4] The $5.00 marker fee has not been challenged in these actions.

[5] Act 234 defines "motor carrier" as "Every person who operates or causes to be operated any motor vehicle on any highway in this Commonwealth." 75 Pa. C.S.A. § 9901.

> In addition to any other tax imposed by law, all motor carriers shall pay an annual tax in the amount of $36 per axle on every truck, truck tractor or combination having a gross weight or registered gross weight in excess of 26,000 pounds operated on the highways of this Commonwealth.

75 Pa.C.S.A. § 9902. This tax must be paid "at the time a motor carrier applies for vehicle registration or for the issuance of an identification marker or permit pursuant to section 2102. . . ." 75 Pa.C.S.A. § 9903. The full axle tax applies to all motor carrier vehicles, regardless of state or province of registration, which travel at least 2,000 miles annually in this Commonwealth; vehicles traveling less than 2,000 miles annually are entitled to a rebate prorated in accordance with the actual mileage.[6] 75 Pa.C.S.A. § 9905. Additionally, payment of the axle tax is excused if the motor carrier has obtained a 5 day trip permit for $25. 75 Pa.C.S.A. § 2102(d).

The Legislature has declared the purpose of the axle tax as follows:

> It is the declared policy of the Commonwealth that the money raised by the tax imposed by this chapter be used, to the greatest extent possible, to provide for the creation of jobs and the rehiring of the unemployed in this Commonwealth. In order to reach this goal, firms with Pennsylvania-based facilities shall be actively solicited to make bids on contracts to furnish products and materials, including, but not limited to, steel and steel products, to be used in the projects funded through the Highway Bridge Improvement Restricted Account.

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[6] The rebate is calculated in accordance with the following formula:

$$\frac{\text{2000 miles - actual miles traveled}}{\text{2000 miles}} \times \text{axle tax paid} = \text{rebate}$$

75 Pa.C.S.A. § 9907(b). To that end, all proceeds from the axle tax and trip permits are to be "deposited in the Highway Bridge Improvement Restricted Account within the Motor License Fund" and appropriated for expenditure on bridge rehabilitation, replacement and removal projects. 75 Pa.C.S.A. § 9907(a) and 9908.

Section 1 of Act 234 simultaneously amended section 1916(a) of the Vehicle Code and, beginning with the weight class upon which the axle tax is first imposed (26,001-30,000 pounds), reduced the annual Pennsylvania truck or truck tractor registration fees in multiples of $36.00. The practical operation of this simultaneous reduction in registration fees was explained by the Commonwealth Court:

> The incremental $36.00 registration fee reductions roughly correspond to the number of axles legally required for vehicles of various weights. Permissible maximum gross weights for two-axle, three-axle and four-axle trucks are 38,000 pounds, 58,400 pounds and 73,280 pounds, respectively. *See* 75 Pa.C.S. § 4941(c). Vehicles registered with maximum gross or combination weights of 26,001-40,000 pounds, 40,001-60,000 pounds, 60,001-73,280 pounds and 73,281-80,000 pounds, sustained registration fee reductions in amounts of $72.00, $108.00, $144.00 and $180.00, respectively. Registration fee reductions generally offset the tax owed based on the number of axles ordinarily required of vehicles within each affected weight class.[3]

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[3] The correspondence between registration fee reductions and the number of axles is not perfect. For example, trucks weighing between 38,001 and 40,000 pounds are required to have three axles, yet registration fees were reduced by $72.00 rather than $108.00

American Trucking Associations, Inc. v. Bloom, 87 Pa. Commw. 345, 487 A.2d 465, 467 & n. 3 (1985).

II

THE CLASS ACTION SUITS

A. AMERICAN TRUCKING I

No. 11 M.D.Appeal Docket 1985 (Appeal from Order of the Commonwealth Court entered at No. 315 C.D. 1982)

Appellees are American Trucking Associations, Inc. (ATA), a non-profit corporation/federation of 51 state trucking associations and 13 national conferences, and two non-Pennsylvania corporations engaged in the interstate motor carrier business. As plaintiffs below, appellees filed an original class action complaint with the Commonwealth Court seeking to have section 2102(b) of the Vehicle Code, the marker fee, declared unconstitutional. Appellees were certified to represent a class of plaintiffs consisting of all interstate motor carriers whose vehicles are registered outside of Pennsylvania and who are or will be subject to the identification marker and marker fee requirement imposed by Act 68. Appellants are James I. Scheiner, Secretary of the Department of Revenue, Leroy S. Zimmerman, Attorney General of the Commonwealth, and Jay Cochran, Commissioner of the Pennsylvania State Police.[7]

The complaint set forth the following challenges to the constitutionality of the marker fee: that it was discriminatory and unduly burdensome under the Commerce Clause, U.S. Const. Art. I, § 8, cl. 3; that it violated the Privileges and Immunities Clause, Art. VI, § 2; that it violated the Equal Protection Clause, amend. XIV and the Uniformity Clause of the Pennsylvania Constitution,

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[7] Appellant Scheiner succeeded Robert K. Bloom, an original defendant, as Secretary of Revenue during the pendancy of this action and was, therefore, substituted under Pa. R.A.P. Rule 502. Similarly, appellant Cochran replaced the late Daniel F. Dunn, an original defendant, as Commissioner of the Pennsylvania State Police.

Art. VIII, § 1; and that it violated the Supremacy Clause, Art. VI, cl. 2.[8] The gravamen of most of these allegations is discrimination perceived against interstate commerce in favor of local commerce in that, by "deeming" the marker fee to be part of and included in the Pennsylvania registration fee, Act 68 actually imposed the $25.00 marker fee "exclusively upon motor carrier vehicles registered outside of Pennsylvania for the privilege of using the highways of the Commonwealth." Complaint paras. 42, 50, 52, 61. The second principal contention was that Act 68 imposed an "unlawful burden" under the Commerce Clause upon interstate motor carriers because the marke[r] fee is a flat tax that is "wholly unrelated to the volume, value or nature of the services provided by the Commonwealth" and is "wholly unrelated to the magnitude or nature of any benefit received by or conferred upon" interstate motor carriers. Complaint para. 46.

Appellees' prayer for relief sought a declaration that section 2101(b) of the Vehicle Code (as originally enacted by Act 68) was unconstitutional and sought an injunction against its enforcement. Additionally, appellees sought immediate refund of "any $25.00 payments received from interstate motor carriers on account of marker fees for the year commencing April 1, 1982."[9]

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[8] Although the Commonwealth Court decided only the Commerce Clause issue in appellees' favor, appellees reiterate all of the remaining constitutional objections in their appeal before this Court, except for the Supremacy Clause argument. Accordingly, the Supremacy Clause challenge has been abandoned.

[9] Appellees were also certified to represent a subclass of plaintiffs in this class action at No. 315 C.D. 1982. This subclass consisted of all interstate motor carriers whose vehicles were registered in any of the states or provinces with which Pennsylvania had entered into bilateral Apportioned Registration Agreements and whose vehicles were or would be subject to the $25.00 marker fee. Count VII of the complaint asserted, alternatively, that this subclass was being discriminated against because payment of the marker fee by its members, who also paid an apportioned Pennsylvania registration fee that was "deemed" to include that marker fee, amounted to pay-

The parties filed an elaborate Joint Stipulation of Facts. Additionally, trial was held before the Honorable Robert W. Williams, Jr., under the original jurisdiction of the Commonwealth Court concerning the validity of appellees' survey which purported to establish the discriminatory impact of the marker fee upon foreign registered vehicles. The trial court held that the marker fee discriminated against such vehicles and in favor of Pennsylvania registered vehicles, declared section 2102(b) of the Vehicle Code unconstitutional under the Commerce Clause, and ordered refund of marker fee payments made after April 1, 1982 pursuant to stipulation of the parties regarding refunds. 77 Pa.Commw. 575, 466 A.2d 755 (1983). The amount of the refund would be approximately ten million dollars, payment of which has been deferred pending "final decision" of this matter, pursuant to stipulation.

Exceptions were taken to the trial court's order which the Commonwealth Court overruled *en banc*. 87 Pa. Commw. 345, 487 A.2d 468 (1985) (Opinion per Williams, J.; Crumlish, P.J. and Barry, J., dissenting). The Commonwealth Court viewed the issue as "whether the Legislature intended to, and actually did, incorporate the $25.00 marker fee when it increased Pennsylvania-based motor carrier vehicle registration fees under Act 68." *Id.* at 350, 487 A.2d at 470.

That court identified the appropriate standard of review of legislation alleged to be violative of the Commerce Clause:

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ment in excess of the $25.00 marker fee. Refund of the excess was demanded. In April, 1982, the Department of Transportation announced that, because Pennsylvania registration fees were deemed to include the $25.00 marker fee, $25.00 was to be subtracted from the registration fees before they were apportioned. Refunds were ordered and have been made by the Commonwealth of the amounts in excess of $25.00 erroneously received from members of this subclass prior to April, 1982. Accordingly, Count VII of the complaint has been rendered moot and is not an issue in this appeal.

> Local taxation of interstate commerce does not violate the Commerce Clause when the levy (1) is applied to an activity with a substantial nexus to the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce and (4) is fairly related to local services. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S.Ct. 1076, 1079, 51 L.Ed.2d 326 (1977). A state tax's validity under the Commerce Clause must be measured by the statute's actual effect on interstate commerce in the context of the state's entire, interrelated taxing scheme. *Maryland v. Louisiana*, 451 U.S. 725, 756, 101 S.Ct. 2114, 2134, 68 L.Ed.2d 576 (1981) (Louisiana's "first-use" tax on natural gas invalidated because local users benefited by a series of exemptions and credits).

Id. at 350, 487 A.2d at 471.[10] Nevertheless, the Commonwealth Court focused on legislative history preceding the adoption of Act 68 and "divine[d] a legislative intent to exempt Pennsylvania-registered motor carrier vehicles from payment of the $25.00 marker fee." *Id.*[11] Accord-

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[10] The parties agree that the validity of the highway user fees challenged in these appeals under thhe Commerce Clause is governed by the four-part test enunciated by the United States Supreme Court in *Complete Auto.*

[11] That court's "divination" of the discriminatory legislative intent was based upon the following analysis:

> Act 68's precursor, Senate Bill No. 10 (Printer's No. 965), significantly raised motor carrier vehicle registration fees, without including a marker fee provision, when first reported from Transportation Committee on June 25, 1979. On July 10, 1979, a $5.00 identification marker decal provision was added to Senate Bill No. 10 (Printer's No. 1038). When the $25.00 marker fee was subsequently introduced in Senate Bill No. 10 (Printer's No. 1834), which was reported from Conference Committee on May 27, 1980, the motor carrier vehicle registration fees were never increased to reflect the newly added privilege tax. Moreover, the registration cost for vehicles weighing between 68,001 to 78,280 prounds was reduced by $41.00. Since

ingly, the Commonwealth Court affirmed the trial court's finding that section 2102(b) of the Vehicle Code "facially offends the third prong of the *Complete Auto* standard which proscribes discrimination against interstate commerce," *id.* and did not address appellees' remaining exceptions.

Appellants then filed this direct appeal from a final order of the Commonwealth Court in a matter originally commenced therein. 42 Pa. C.S.A. § 723(a).

B. AMERICAN TRUCKING II

No. 12 M.D.Appeal Docket (Appeal from Order of the Commonwealth Court entered at No. 267 C.D. 1983)

Appellees in this action are ATA and four different non-Pennsylvania corporations engaged in the interstate motor carrier business. As plaintiffs below, appellees filed an original class action complaint with the Commonwealth Court seeking to have section 9902 of the Vehicle Code, the axle tax, declared unconstitutional. Appellees were certified to represent a class of plaintiffs consisting of all interstate motor carriers who own vehicles registered outside of Pennsylvania who are or will be subject to the axle tax, as well as a subclass of plaintiffs consisting of such interstate motor carriers who are registered in any of the states or provinces that are not members of the International Registration Plan. Appellants are the same public officials named as defendants in *American Trucking I* who are charged with the duty to administer and enforce the challenged legislation. (*See* note 7, *supra* and accompanying text). The axle tax was challenged as violative of: the Commerce Clause as discriminating

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the Legislature never increased registration fees in response to the subsequent $25.00 marker levy, we *divine a legislative intent to exempt Pennsylvania-registered motor carriers from payment* of the $25.00 marker fee. (emphasis added).

against and unduly burdensome to interstate commerce; the Privileges and Immunities Clause; the Equal Protection Clause; and the Uniformity Clause of the Pennsylvania Constitution. As in *American Trucking I*, the gravamen of most of these allegations is discrimination. Appellees have asserted throughout these proceedings that the imposition of the $36 per axle tax upon all motor carrier vehicles, accompanied by Act 234's simultaneous reduction in the Pennsylvania registration fees almost exactly offsetting the amount of the axle tax for Pennsylvania registered vehicles, was facially and actually discriminatory and imposed the full burden of the axle tax upon non-Pennsylvania registered interstate motor carriers. Complaint paras. 42, 43, 50, 52, 56. Appellees' second principal contention was that Act 234 imposed an "unlawful burden" upon interstate motor carriers because the axle tax is a flat tax that is unrelated to the "volume, value or nature of the services provided by the Commonwealth" and is "wholly unrelated to the magnitude or nature of any benefit received by or conferred upon" interstate motor carriers. Complaint par. 46.

Appellees' prayer for relief sought a declaration that section 9902 of the Vehicle Code (Act 234) was unconstitutional and sought an injunction against its enforcement. Appellees also sought "repayment of all sums already collected by defendants pursuant to the Axle Tax forthwith together with interest."

Appellants filed an Answer and New Matter asserting that the axle tax is imposed equally upon all interstate motor carrier vehicles whether registered in Pennsylvania or outside of Pennsylvania. While the appellants conceded that the reduction in Pennsylvania registration fees equaled the amount of the axle tax in most cases, and substantially offset the amount of the axle tax in the other cases, they denied that Act 234 or the axle tax discriminated against non-Pennsylvania registered interstate motor carriers or that it placed an unlawful burden

upon interstate commerce. The crux of appellants' defense is and has been that Act 234, imposing the axle tax while reducing Pennsylvania registration fees, "effects a rational restructuring of Pennsylvania's highway user charges" which increased the burden borne by those interstate motor carriers who had been least burdened before, *i.e.*, those carriers who did not pay Pennsylvania's substantial (higher than the national average) registration fees. Thus, appellants argue that Act 234 does not discriminate against appellees and that, in fact, "local commerce" (Pennsylvania registered interstate motor carriers) bears more of the burden of Pennsylvania's highway user fees than does "interstate commerce" (non-Pennsylvania registered interstate motor carriers).

Both sides filed extensive affidavits of fact regarding expenditures of funds received by imposition of the axle tax, the impact of that tax upon various categories of highway users, etc. Although some of the factual assertions were disputed, both sides filed cross-motions for summary judgment. The Commonwealth Court *en banc* granted appellees' motion for summary judgment, denied appellants' motion, declared section 9902 of the Vehicle Code unconstitutional under the Commerce Clause, and ordered refunding of axle tax payments made by affected class members after April 1, 1983 in accordance with stipulations reached by the parties concerning refunds. 87 Pa.Commw. 379, 487 A.2d 465, 468 (1985) (per Williams, J.; Crumlish, P.J., and Barry, J. dissenting). That court held:

> Commerce Clause jurisprudence distinguishes between two types of legislation: (1) protectionist measures that are infused with discriminatory purpose or effect and (2) facially neutral acts that regulate evenhandedly to promote legitimate local interests, with incidental effects on interstate commerce. *See Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S.Ct. 2531, 2535, 57 L.Ed.2d 475

(1978). Economic protectionist legislation is subject to a "virtually per se rule of invalidity," while a facially neutral measure is invalidated whenever burdens on interstate commerce clearly outweigh putative local benefits. *Id.*

* * * *

Examining the Axle Tax in conjunction with the simultaneously enacted registration fee reductions, we conclude that the assessment facially discriminates against interstate commerce. The registration fee reductions almost always offset assessments, virtually insulating operators of locally but not foreign, registered vehicles from the levy's financial impact. Since the Axle Tax discriminatorily affects the operators of foreign-registered vehicles, who bear the full brunt of the tax, the assessment constitutes economic protectionism and is facially invalid. *See Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977).

. . .

Id. at 382, 487 A.2d at 467.

Given this disposition, the Commonwealth Court did not address appellees' other constitutional arguments. Appellants then filed this direct appeal with this Court. Payment of this refund has been stayed pending the outcome of this appeal.

C. AMERICAN TRUCKING III

No. 19 M.D.Appeal Docket (Appeal from Order of the Commonwealth Court entered at No. 160 C.D. 1984).

The appellants/plaintiffs in this class action suit are ATA and the same non-Pennsylvania corporations which are appellees/plaintiffs in *American Trucking I*. Appellees are the same Commonwealth officials who are appel-

lants/defendants in *American Trucking I and II*. Appellants herein inform us that this action is "identical in all respects" to *American Trucking I*, except for the time period for which refunds are sought. This "present action seeks only that relief which was inadvertently not requested in the prior action, the refund of taxes paid in the first two years of the operation of the (marker fee) tax, *i.e.*, August 18, 1980 to March 31, 1982." Brief for Appellants at 4.

The Commonwealth Court granted appellees' preliminary objections and held that it did not have jurisdiction over the case because appellants did not initially seek refunds from the Board of Finance and Revenue under section 503 of the Fiscal Code, 72 P.S. § 503, and hence, had failed to exhaust their administrative remedies. 87 Pa.Commw. 418, 489 A.2d 269 (1985). Appellants then filed this direct appeal, and all three appeals were consolidated for oral argument.

III

THE COMMERCE CLAUSE

The Commerce Clause, U.S. Const. Art. I, § 8, cl. 3 provides that the United States "Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States. . . ." The "basic purpose of the Clause" is to "prohibit the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution." *Maryland v. Louisiana*, 451 U.S. 725, 754, 101 S.Ct. 2114, 2133. 68 L.Ed.2d 576 (1981), *quoting Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329, 97 S.Ct. 599, 607, 50 L.Ed.2d 514 (1977). From this basic purpose stems one of the fundamental principles of Commerce Clause jurisprudence, an antidiscrimination principle. *Id.* This principle is that no state, consistent with the Commerce Clause, may "impose a tax which discriminates against

interstate commerce . . . by providing a direct commercial advantage to local business." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458, 79 S.Ct. 357 362, 3 L.Ed.2d 421 (1959).

The antidiscrimination principle, and several other principles that have evolved through years of Commerce Clause litigation, have been incorporated into the four-part test enunciated by the United States Supreme Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). *Complete Auto* reiterated the oft-stated maxim that a state's taxing law is not *per se* invalid merely because it burdens interstate commerce since interstate commerce may constitutionally be required to "pay its way," *i.e.*, its just share of the state's expenditures for services provided. *Maryland v. Louisiana*, *supra*. However, the Commerce Clause places limitations on the state's right to tax interstate commerce. A state tax upon interstate commerce will violate the Commerce Clause unless it: (1) has a substantial nexus with the state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady*, *supra* at 430 U.S. 277-78, 97 S.Ct. 1078-79; *Maryland v. Louisiana*, *supra* at 451 U.S. 754, 101 S.Ct. 2133.[12]

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[12] It could be argued with some authority that the highway user fees in the instant appeals should be judged not by the *Complete Auto* four-part test, but by a test more specifically attuned to these particular types of taxes or fees, namely charges "imposed by the State for the use of state-owned transportation or other facilities or services." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621, 101 S.Ct. 2946, 2955, 69 L.Ed.2d 884 (1981), *citing Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 92 S.Ct. 1349, 41 L.Ed.2d 620 (1972); *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 59 S.Ct. 744, 83 L.Ed. 1001 (1939); *Ingels v. Morf*, 300 U.S. 290, 57 S.Ct. 439, 81 L.Ed. 653 (1937). In such cases, it is arguable that only the third and fourth facets of the *Complete Auto* standard are relevant and that the fees or charges will be judged solely to determine whether they discriminate against

In applying this test, the focus is always upon the effect or economic consequences of the state tax upon interstate commerce. *See, e.g., Complete Auto, supra*; *Westinghouse Electric Co. v. Tully*, 466 U.S. 388, 104 S.Ct. 1856, 80 L.Ed.2d 388 (1984); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 615, 101 S.Ct. 2946, 2952, 69 L.Ed.2d 884 (1981) ("In reviewing Commerce Clause challenges to state taxes, our goal has . . . been to 'establish a consistent and rational method of inquiry' focusing on 'the practical effect of a challenged tax.' *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 [100 S.Ct 1223, 63 L.Ed.2d 510] . . . (1980).") As stated in *Maryland v. Louisiana*, supra:

> A state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme. "In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56, 61 S.Ct. 334, 335, 85 L.Ed.2d 275 (1940). 451 U.S. at 756, 101 S.Ct. at 2134 (further citations omitted).

The delicate balance between conflicting state's interests (the right to charge a user for services rendered) and those of interstate commerce (to be free of unlawful and unfair burdens and regulations) requires careful analysis of "the unique characteristics of the statute at issue and the particular circumstances in each case." *Boston Stock Exchange v. State Tax Commission*, *supra*

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interstate commerce and whether the fees are "manifestly disproportionate to the services rendered." *Commonwealth Edison Co. v. Montana*, *supra* at 453 U.S. 622, n.12, 101 S.Ct. 2956, n.12; *Evansville-Vanderburgh Airport*, *supra*. Nevertheless, as the parties and the Commonwealth Court have proceeded in these cases under the *Complete Auto* analysis, and since the "user fee" standards are incorporated within the *Complete Auto* test, we will apply *Complete Auto* in our analysis of the challenged statutes.

at 429 U.S. 321, 97 S.Ct. 603; *Westinghouse Electric Co. v. Tully, supra.* Moreover, in challenging the constitutionality of a state's taxing legislation under the Commerce Clause, the burden is on the challenger to overcome the presumption of validity given to all such legislation. *Evansville-Vanderburgh Airport, supra* at 405 U.S. 713, 92 S.Ct. 1353; *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 548, 70 S.Ct. 806, 809, 94 L.Ed. 1053 (1950). *See also The Statutory Construction Act of 1972*, 1 Pa. C.S.A. § 1922(3) (The General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth). It has been previously noted, "[Pennsylvania] case law involving the constitutionality of state taxation places a very heavy burden on those who seek to upset such taxation." *Campbell v. Coatesville Area School District*, 440 Pa. 496, 501, 270 A.2d 385, 388 (1970). *See also Leonard v. Thornburgh*, 507 Pa. 317, 489 A.2d 1349, 1351-52 (1985) (tax legislation will not be declared unconstitutional unless it "clearly, palpably, and plainly violates the constitution"). Thus, the burden is upon the party challenging a statute's constitutionality to "clearly, palpaby, and plainly" show that the statute violates the Constitution. *Commonwealth v. Robinson*, 497 Pa. 49, 53, 438 A.2d 964, 966 (1981).

With the foregoing standards to guide us, we will review the marker fee and the axle tax to determine their validity under the Commerce Clause.

A. THE MARKER FEE—ACT 68 AMERICAN TRUCKING I

As noted, the $25.00 marker fee imposed by Act 68 (then-in-effect 75 Pa.C.S.A. § 2101(b)) is a flat fee imposed for the privilege of using Pennsylvania's highways. The marker fee clearly satisfies the first two elements of the *Complete Auto* test. It is applied to an activity—the use of Pennsylvania's highways for interstate commerce—with a substantial nexus to Commonwealth. There is also

no issue as to whether it is "fairly apportioned" between several taxing states each having a substantial nexus with the activity (as with a tax on gross sales receipts wherein two or more states have contributed to the sales and may each, therefore, lay claim to some portion of the receipts) becasue the activity taxed is a purely local event. Appellees attack the validity of the marker fee under the third and fourth facets of the *Complete Auto* test arguing that it discriminates against interstate commerce and that it is not fairly related to the services provided by the Commonwealth. We reject both arguments.

There is obviously no discrimination if Pennsylvania registered and non-Pennsylvania registered motor carriers are equally burdened by the marker fee. The difficulty is that Act 68 collected $25.00 per vehicle from all motor carriers using Pennsylvania roads, but then "deemed" that fee as incorporated within Pennsylvania's registration fee. Appellees call this "deeming" a clever pretext insulating Pennsylvania registered vehicles from the impact of the marker fee. The Commonwealth Court accepted this argument based upon its finding that the word "deemed" as used in section 2101(b) was vague and ambiguous and its reliance upon the legislative history of Act 68 and its precursor, Senate Bill No. 10, from which it "divined" a discriminatory intent. (See note 11, *supra*). The Commonwealth Court's finding of ambiguity, its reliance on legislative history and the conclusion that court "divines" therefrom are erroneous.

Under our rules of statutory construction we are to resort to an act's contemporaneous legislative history only when the language of the act is ambiguous. 1 Pa.C.S.A. §§ 1921(b) and (c)(7).[12] Because we find the language

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[12] Even in that instance, however, the relevant legislative history would be that which is contemporaneous to the time of the act's passage. Here the Commonwealth Court superimposed upon the legislative history of Act 68 that of Senate Bill 10 which was in-

of § 2102(b) clear and free from ambiguity, we find the Commonwealth Court's heavy reliance upon Act 68's legislative history unwarranted.

According to Webster's Third New International Dictionary, the common definitions of the word "deem" are "to judge; classify after some reflection; hold." We are obligated to use the common meaning of words when construing statutes. 1 Pa.C.S.A. § 1903. Thus under section 2102(b), for Pennsylvania-registered vehicles, the marker fee has been classified, adjudged or held to be included in the vehicle registration fee. When the language of a statute can be interpreted free of ambiguity, it is not for the court to create an ambiguity. *See e.g. Hellertown Manufacturing Company v. Commonwealth*, 480 Pa. 358, 365, 390 A.2d 732, 735 (1978).

In finding the word "deemed" to be vague, and resorting to legislative history to "divine" a discriminatory legislative intent, it would seem that the Commonwealth Court simply chose not to believe the legislature when it stated that the marker fee is "deemed a part of and included within" Pennsylvania's vehicle registration fees. Thus that court seems to have presumed that the General Assembly intended to violate the Constitution. Obviously, the judiciary has no authority to presume such an unconstitutional motive or intent by a co-equal branch of government. 1 Pa.C.S.A. § 1922(3).

Moreover, and most critically, it was improper for the Commonwealth Court to focus almost exclusively upon the legislative intent since Commerce Clause jurisprudence dictates that we assess the state tax "in light of its *actual effect* considered *in conjunction with other provi-*

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troduced a year before Act 68 and which was never enacted. We cannot assume that the legislative intent is a constant. The legislative intent behind Senate Bill 10 was extinguished when that bill failed to pass, and cannot be superimposed upon the legislative intent behind Act 68.

sions of the state's tax scheme," and determine whether the statute does *in practical operation work discrimination against interstate commerce. Maryland v. Louisiana, supra* at 451 U.S. 756, 101 S.Ct. 2134. So viewed, it is apparent that the marker fee does not work *any* discrimination against interstate commerce in practical operation.

There is no question that Pennsylvania registered vehicles pay a substantial registration fee which members of the class represented by appellees are not subject to. There is also no question that Act 68 actually and simultaneously increased that registration fee by anywhere from $45.00-$228.00 for the vehicles in the class affected by the marker fee. Thus, while the interstate motor carriers in the class represented by appellees were charged $25.00 per vehicle, Pennsylvania registered vehicles were charged that $25.00 *plus increased registration fees of an additional* $20.00-$203.00. There is no discrimination, therefore, against interstate commerce since Act 68 imposed a $25.00 marker fee on all motor carriers in the class represented by appellees and deemed a like amount of the simultaneous increase in Pennsylvania registration fees as the marker fee for Pennsylvania registered vehicles. *In each instance,* Act 68 placed a greater burden upon "local commerce" (Pennsylvania registered motor carrier vehicles) than upon "interstate commerce" (motor carrier vehicles represented by appellees).

Because there is no discrimination in the imposition of the marker fee upon interstate motor carriers represented by appellees, we must uphold Act 68 unless it fails the fourth facet of the *Complete Auto* test, *i.e.*, unless it is not fairly related to the services provided by the Commonwealth of Pennsylvania. Such is not the case.

Appellees accept the $5.00 administrative costs associated with the marker fee (*see* note 4, *supra*) as "fairly related" to the services provided by the Commonwealth, but they contend that the additional $20.00 which goes into the Motor License Fund is "wholly unrelated" to any

services provided by the Commonwealth or received by non-Pennsylvania registered motor carriers. Essentially, this argument is that flat taxes, such as the marker fee, are not fairly related to the services provided by a state because it can reasonably be expected that "interstate commerce" will use those services (the highways and related facilities/services) less than "local commerce", and thus will produce a greater impact upon "interstate commerce" in terms of cost per mile of the marker fee or any other flat tax.[15] This argument misconstrues the nature of the "fairly related" requirement of the Commerce Clause as it applies to flat fees and taxes.

In *Commonwealth Edison Co. v. Montana*, *supra*, the United States Supreme Court considered a Commerce Clause challenge to Montana's severance tax on coal extracted from within its borders. The appellants there argued that the severance tax discriminated against interstate commerce and that it was not fairly related to the services provided by Montana. Prefatory to its discussion of whether Montana's severance tax was "fairly related" to services provided, that Court stated:

> [I]n reviewing appellants' contentions, we put to one side those cases in which the Court reviewed challenges to "user" fees or "taxes" that were designed and defended as a specific charge imposed by the State for the use of state-owned or state-provided transportation or other facilities and services. *See, e.g. Evansville-Vanderburg Airport Authority Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 [92 S.Ct. 1349,

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[15] There is overlap between the various "prongs" of the *Complete Auto* test. Appellees' "cost per mile" argument concerning the nature of flat taxes generally, and the marker fee specifically, clearly raises discrimination concerns under the third prong as well as the fourth. *See e.g., Commonwealth Edison Co. v. Montana*, *supra* at 453 U.S. 620, 101 S.Ct. 2955 ("appellants' discrimination theory [that the tax burden borne by the out-of-state consumers of Montana coal is excessive] . . . is, of course, merely a variant of appellants' assertion that the Montana tax does not satisfy the 'fairly related' prong . . . .").

31 L.Ed.2d 620] (1972); *Clark v. Paul Gray, Inc.*, 306 U.S. 583 [59 S.Ct. 744, 83 L.Ed.2d 1001] (1939); *Ingels v. Morf*, 300 U.S. 290 [57 S.Ct. 439, 81 L.Ed.2d 653] (1937).[12]

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[12] As the Court has stated, "such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes." *Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183 [51 S.Ct. 380, 75 L.Ed. 953] (1931). Because such charges are purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services, we have required a showing, based on factual evidence in the record, that "the fees charged do not appear to be manifestly disproportionate to the services rendered . . . ." *Clark v. Paul Gray, Inc.*, 306 U.S. at 599 [59 S.Ct. at 753], *Ingels v. Morf*, 300 U.S. at 296-297 [57 S.Ct. at 442-443].

453 U.S. at 621-22 & n. 12, 101 S.Ct. at 2955-56 & n. 12 (parallel citations omitted).

In *Evansville-Vanderburgh Airport, supra*, 405 U.S. 707, 92 S.Ct 1349, 31 L.Ed.2d 620 (1972), the United States Supreme Court rejected a Commerce Clause challenge to the imposition of a $1.00 per passenger fee imposed by the airport authority upon each passenger enplaning on a commercial airplane. The Court there stated:

> We . . . regard it as settled that a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their construction and maintenance may constitutionally be imposed on interstate and domestic users alike . . . . The facility provided at public expense aids rather than hinders the right to travel. A permissible charge to help defray the cost of the facility is therefore not a burden in the constitutional sense.
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> Our decisions concerning highway tolls are instructive. They establish that the States are empowered to develop "uniform, fair and practical" standards for this type of fee . . . (Numerous citations omitted.)

We have also held that a State may impose a flat fee for the privilege of using its roads, without regard to the actual use by particular vehicles, so long as the fee is not excessive. *Aero Mayflower Transit Co. v. Georgia Public Service Comm'n*, 295 U.S. 285 [55 S.Ct. 709, 79 L.Ed. 1489] (1935); *Morf v. Bingaman*, 298 U.S. 407 [56 S.Ct. 756, 80 L.Ed. 1245] (1936); *Aero Mayflower Transit Co. v. Board of Railroad Comm'n*, 332 U.S. 495 [68 S.Ct. 167, 92 L.Ed. 99] (1947). And in *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 [70 S.Ct. 806, 94 L.Ed. 1053] (1950), the Court sustained a Maryland highway toll of "2% upon the fair market value of motor vehicles used in interstate commerce." That toll was supplemental to a standard mileage charge imposed by the State, so that "the total charge as among carriers [did] vary substantially with the mileage traveled." *Id.* [339 U.S.], at 546 [70 S.Ct. at 808]. It was there argued, however, that the correlation between tax and use was not precise enough to sustain the toll as a valid user charge. Noting that the tax "should be judged by its result, not its formula, and must stand unless proven to be unreasonable in amount for the privilege granted," *id.*, at 545 [70 S.Ct. at 808], the Court rejected the argument:

"Complete fairness would require that a state tax formula vary with every factor affecting appropriate compensation for road use. These factors, like those relevant in considering the constitutionality of other state taxes, are so countless that we must be content with 'rough approximation rather than precision.' *Harvester Co. v. Evatt*, 329 U.S. 416, 422-423 [67 S.Ct. 444, 447, 91 L.Ed. 390]. Each additional factor adds to administrative burdens of enforcement, which fall alike on taxpayers and government. We have recognized that such burdens may be sufficient to justify states in ignoring even such a key factor as mileage, although the result may be a tax which

> on its face appears to bear with unequal weight upon different carriers. *Aero Transit Co. v. Georgia Comm'n*, 295 U.S. 285, 289 [55 S.Ct. 709, 710, 79 L.Ed. 1439]. Upon this type of reasoning rests our general rule that taxes like that of Maryland here are valid unless the amount is shown to be in excess of fair compensation for the privilege of using state roads." *Id.* [339 U.S.], at 546-547 [70 S.Ct. at 809].

405 U.S. at 714-716, 92 S.Ct. at 1354-1355 (parallel citations omitted).

Furthermore, the fact that a flat tax imposed upon all commerce, interstate and local alike, *may* have a greater impact upon interstate commerce, *if* such commerce actually uses the services or facilities less than local[16] commerce, is inconsequential to our Commerce Clause analysis. Interstate motor carriers are free to use the Commonwealth's highways as often and for whatever distances they wish and cannot be heard to complain that, because they choose to use those highways less frequently than motor carriers whose vehicles are registered in Pennsylvania *may* use them, the burden of the flat fee falls too heavily upon them. "One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may." *American Trucking Associations, Inc. v. Goldstein*, 301 Md. 372, 483 A.2d 47 (1984) *quoting Areo Mayflower Transit Co. v. Georgia Public Service Commission*, 295 U.S. 285, 289, 55 S.Ct. 709, 711, 79 L.Ed. 1439 (1935). *See also Aero Mayflowers Transit Co. v. Board of Railroad Comm'n*, 332 U.S. 495, 68 S.Ct. 167, 92 L.Ed. 99 (1947); *Clark v. Paul*

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[16] Given the nature of the interstate motor carrier industry, it is not apparent that non-Pennsylvania registered vehicles use the Commonwealth's highways less frequently than their Pennsylvania counterparts. Some do and some do not. There are many Pennsylvania registered motor carrier vehicles, indeed some who are members of ATA, who do most of their interstate traveling outside of Pennsylvania, and the converse is also frequently the case. Brief for Appellants at 22, n.15.

Gray, Inc., 306 U.S. 583, 59 S.Ct. 744, 83 L.Ed.2d 1001 (1939); *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 70 S.Ct. 806, L.Ed. 1053 (1950).

Thus, so long as the flat fee charged is not manifestly disproportionate to the services rendered, *i.e.*, not excessive, the fee is "fairly related" to those services for Commerce Clause purposes. Moreover, the burden is on the challenger to demonstrate that the flat fee is excessive in relation to the services charged. *Clark v. Paul Gray, Inc.*, *supra* 306 U.S. at 599, 59 S.Ct. at 753 and cases cited therein; *Evansville-Vanderburgh Airport*, *supra*. Appellees have failed to sustain this burden.

All Pennsylvania highway user fees are deposited into the Motor License Fund and expended solely for road-related purposes. JSF para. 64. For the period from April 1, 1981 through November 30, 1982, total highway user fees collected from all motor carrier vehicles subject to the marker fee amounted to approximately $304 million. JSF para. 99. The marker fee portion of the Motor Carrier Road Tax Act for that period was approximately $12,594,000.00. JSF paras. 70 and 71. For that same period, Motor License Fund expenditures for highway construction and maintenance, state police services and construction bond debt service totalled approximately $1½ *billion*. JSF paras. 46-51. While cars and other vehicles not subject to the marker fee also use the Commonwealth's highways and benefit from these expenditures, JSF para. 52, use of the highways by the heavier vehicles subject to the marker fee necessitate significantly higher road-related expenditures than these lighter vehicles in the categories of construction of road bases and surfaces, construction of bridges, paving of road shoulders, road-grading and drainage and truck weight facilities. JSF para. 53. It is apparent that appellees have failed to sustain their burden of demonstrating that the marker fee is excessive, manifestly disproportionate to the services rendered or not fairly related to those services.

For the foregoing reasons, we hold that the Commonwealth Court erred in declaring Act 68 and then-in-effect section 2102(b) of the Vehicle Code (the marker fee) unconstitutional under the Commerce Clause, and we therefore reverse that decision and order.

B. THE AXLE TAX—ACT 234 AMERICAN TRUCKING II

The axle tax is a modified flat fee since it is imposed in accordance with actual use for motor carrier vehicles traveling less than 2,000 miles annually in the Commonwealth and at a flat $36.00 per axle fee after 2,000 miles are traveled. Again, the tax clearly passes constitutional muster under the first two facets of *Complete Auto*, the "substantial nexus" and "fairly apportioned" requirements. The principal challenge to the validity of the axle tax is premised upon the third and fourth prongs of the *Complete Auto* standard, namely that it discriminates against interstate commerce and that it is not "fairly related to services provided."

Obviously, the axle tax itself, standing alone, is incapable of discrimination. Section 9902 of the Vehicle Code imposes the $36.00 per axle fee on "every truck, truck tractor or combination having a gross weight or gross registered weight in excess of 26,000 pounds operated on the highways of this Commonwealth." On its face and in actual operation, this axle tax is collected from Pennsylvania and non-Pennsylvania registered vehicles alike.

The difficulty, however, is when we place the axle tax in conjunction with all other relevant taxing provisions, as we must, particularly Act 234's simultaneous reduction of the registration fees paid by Pennsylvania registered vehicles subject to the axle tax. As noted, that registration fee reduction almost exactly offsets the $36.00 per axle tax. Appellees argue that Act 234, therefore, was intended to and actually did discriminate against interstate commerce and impose the full brunt of the axle

tax upon interstate (non-Pennsylvania registered) commerce. At first blush, this is an appealing argument.

Appellants concede that in reducing the Pennsylvania registration fees by amounts offsetting the $36.00 per axle tax, it indeed intended to lessen the burden imposed upon "local commerce." However, appellants deny that the effect of this reduction in registration fees is to discriminate against interstate commerce in favor of local commerce. Rather, appellants contend that Act 234 "effects a rational restructuring of Pennsylvania's highway user charges" which is a lawful and nondiscriminatory restructuring under the Commerce Clause. We agree.

The Commonwealth Court held:

> [W]e conclude that the assessment facially discriminates against interstate commerce. The registration fee reductions almost always offset assessments, virtually insulating operators of locally but not foreign, registered vehicles from the levy's financial impact. Since the Axle Tax discriminatorily affects the operators of foreign-registered vehicles, who bear the full brunt of the tax, the assessment constitutes economic protectionism and is facially invalid.

87 Pa.Commw. at 383, 487 A.2d at 467.

Once again, the Commonwealth Court's focus was far too narrow. Non-Pennsylvania registered motor carrier vehicles pay the $36.00 per axle tax plus the $5.00 marker fee; motor carrier vehicles registered in an IRP jurisdiction pay the axle tax plus an apportioned Pennsylvania registration fee; Pennsylvania registered motor carrier vehicles pay the axle tax plus the full Pennsylvania registration fee. There is no discrimination against interstate commerce in such a taxing scheme in practical operation. In focusing solely on the registration fee *reductions*, the Commonwealth Court ignores the fact that

"local commerce" (Pennsylvania registered motor carrier vehicles) remains subject to substantial highway user fees that "interstate commerce" (vehicles owned by members of the class and subclass represented by appellees) is not subject to.

We reiterate that the focus of the Commerce Clause must always be upon the actual effect or economic consequences of the state tax upon interstate commerce.

> A state tax must be assessed in light of its actual effect *considered in conjunction with other provisions of the State's tax scheme.* "In each case it is our duty to determine whether the statute under attack, *whatever its name may be*, will in its practical operation work discrimination against interstate commerce. (emphasis added.)

Maryland v. Louisiana, *supra* at 451 U.S. 756, 101 S.Ct. 2134.

In assessing the practical effect of Act 234, we need go no further than appellees' own illustration set forth in their class action complaint.

> 30. For example, under the annual registration fee schedule set out in Section 1916 for the 1982 registration year, a truck driver and trailer combination registered in Pennsylvania for a maximum weight of 80,000 pounds would pay $1125 for a one-year registration.
>
> 31. For the 1983 registration year, that same five-axle combination will pay only $945 under the Section 1916 annual registration fee schedule as amended by Act 234. However, that combination must now also pay $36 per axle for each of its five (5) axles, or a total Axle Tax of $180.
>
> 32. The $945 registration fee plus the $180 Axle Tax paid by the motor carrier operating a Pennsylvania-based vehicle will cause it to pay $1125 to

> register its vehicle in the Commonwealth—exactly the same amount as the registration fee prior to Act 234.

Complaint paras. 30-32. To this illustration, we add the undisputed fact that the comparable fees for a five-axle, 80,000 pound combination registered in a foreign non-IRP jurisdiction and operating in Pennsylvania will be $185.00, *i.e.*, an axle tax of $180.00 plus $5.00 marker fee.

Thus, while appellees are correct that a Pennsylvania registered five-axle, 80,000 pound combination pays the same total amount in registration fees and axle tax that it paid solely in registration fees prior to the passage of the Act 234, this fact does not prove any discriminatory effect. Rather, the operative fact is that the Pennsylvania registered combination is subject to an *additional* $940.00 in highway user fees that its counterpart registered in a foregin, non-IRP jurisdiction is not subject to. Similarly, a five-axle, 80,000 pound combination registered in an IRP member jurisdiction will pay some portion of that *additional* $940.00 registration fee that its counterpart in a foreign, non-IRP jurisdiction will not.

Members of the class and subclass represented by appellees ("interstate commerce") thus bear less of the burden of Pennsylvania's highway user fees than do Pennsylvania registered motor carrier vehicles ("local commerce"). Accordingly, the axle tax and Act 234, considered in conjunction with all other provisions of Pennslyvania's highway user fee system, works no discrimination against interstate commerce in practical operation. It is entirely proper for a state to enact a compensatory tax to neutralize or partially offset an economic advantage previously enjoyed by interstate commerce to the disadvantage of local commerce that was caused by operation of that state's taxing scheme. *Alaska*

v. Arctic Maid, 366 U.S. 199, 81 S.Ct. 929, 6 L.Ed.2d 227 (1961); *Halliburton Oil Well Cementing Co. v. Reilly*, 373 U.S. 64, 83 S.Ct. 1201, 10 L.Ed.2d 202 (1963); *Henneford v. Silas Mason Co.*, 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814 (1937). In easing the burden on Pennsylvania registered vehicles, the Commonwealth has neither disadvantaged interstate commerce nor favored local commerce, and the axle tax does not, therefore, discriminate against interstate commerce.

The axle tax is also not excessive or unrelated to the services provided by the Commonwealth. The axle tax proceeds are deposited into the Highway Bridge Improvement Restricted Account within the Motor License Fund, 75 Pa.C.S.A. § 9907(a), and expended on bridge rehabilitation, replacement and removal projects, *id.* at § 9908. Expenditures under this bridge improvement program will exceed $1 billion over 5 years. (Additional revenues of $420 million from federal funding and $400 million from local governments will increase the expenditures by a like amount.) The axle tax revenues generated in fiscal 1983-84 were approximately $68 million in axle tax fees from *all* interstate motor vehicles, and an additional $4.5 million trip permit revenues which may be paid in lieu of the axle tax. 75 Pa.C.S.A. § 2102 (d). (Appellees do not dispute these figures for expenditures and revenues. *See* Appellant's Brief at 6, n. 6 and reproduced record at R. 156-58.)

Furthermore, rebates are given for "incidental use" (under 2000 miles annually) and trip permits are available for occasional use. Under all of these circumstances, appellees have failed to sustain their burden of demonstrating that the axle tax is excessive or is not fairly related to the services provided by the Commonwealth.

Appellees argue, and the Commonwealth Court held, that Act 234's reduction in Pennsylvania registration fees demonstrate a discriminatory intent and amounted

to "economic protectionism." As Justice Benjamin Cardozo stated, "motives alone will seldom, if ever, invalidate a tax that apart from its motives would be recognized as lawful. . . . Catch words and labels, such as the words 'protective tariff' [or 'economic protectionism'], are subject to the dangers that lurk in metaphors and symbols, and must be watched with circumspection lest they put us off our guard." *Henneford v. Silas Mason Co.*, *supra* at 300 U.S. 586, 587, 57 S.Ct. 529.

For the foregoing reasons, we hold that the Commonwealth Court erred in declaring Act 234 and section 9902 of the Vehicle Code (the axle tax) unconstitutional under the Commerce Clause, and we therefore reverse that decision and order.

IV

ADDITIONAL CONSTITUTIONAL CHALLENGES

In all three cases before us, the class action plaintiffs have also challenged the highway user fees on equal protection, uniformity, and privileges and immunities grounds. Almost all of their efforts have been devoted to attacking the highway user fees on Commerce Clause grounds, and the remaining constitutional issues are *all* premised on allegations of discriminatory effect. Since we have determined that neither the marker fee nor the axle tax work a discriminatory effect upon interstate commerce, these remaining constitutional challenges must therefore be rejected.

V

AMERICAN TRUCKING III

As appellants (ATA and the two non-Pennsylvania corporations) in this case inform us, this action is identical to that of *American Trucking I* except for the time frame for which refunds have been sought. Since we

have rejected the constitutional challenges to the marker fee in *American Trucking I*, appellants' challenge here must necessarily fail. Accordingly, we will affirm the order and decision of the Commonwealth Court sustaining appellees' preliminary objections in this case and need not address the propriety of that court's ruling regarding exhaustion of remedies.

VI

Accordingly, the following orders are entered:

The order of the Commonwealth Court entered in No. 315 C.D.1982, 87 Pa.Commw. 345, 487 A.2d 468 (No. 11 M.D.Appeal Docket 1985), *American Trucking I*, is reversed, appellant's exceptions are granted and judgment is entered for appellants.

The order of the Commonwealth Court entered in No. 267 C.D.1983, 87 Pa.Commw. 379, 487 A.2d 465 (No. 12 M.D.Appeal Docket 1985), *American Trucking II*, is reversed, appellants' motion for summary judgment is entered for appellants.

The order of the Commonwealth Court entered in No. 160 C.D.1984, 87 Pa.Commw. 418, 489 A.2d 269 (No. 19 M.D.Appeal Docket 1985), *American Trucking III*, is affirmed.

Flaherty, J., did not participate in the consideration or decision of this case.

Nix, C.J., files a concurring and dissenting opinion in which he "agrees with the results reached by the majority in *American Trucking I*, No. 11 M.D.Appeal Docket 1985, and *American Trucking III*, No. 19 M.D.Appeal Docket 1985", but dissents in *American Trucking II*, No. 12 M.D.Appeal Docket 1985; McDermott, J., joins this concurring and dissenting opinion.

NIX, Chief Justice, concurring and dissenting.

While I agree with the results reached by the mapority in *American Trucking I*, No. 11 M.D.Appeal Docket 1985, and *American Trucking III*, No. 19 M.D.Appeal Docket 1985, I believe the analysis employed by the majority in *American Trucking II*, No. 12 M.D. Appeal Docket 1985, reflects less than a full comprehension of the Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3.

The basic purpose of the Commerce Clause is to prohibit a state from taxing interstate commerce in a manner which discriminates against interstate commerce "by providing a direct commercial advantage to local business." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458, 79 S.Ct. 357, 362, 3 L.Ed. 2d 421 (1959). It is thus necessary to examine the Axle Tax for Highway Bridge Improvement Act ("Axle Tax"), Act of December 8, 1982, P.L. 842, No. 234, 75 Pa.C.S. §§ 9901 *et seq.* ("Act 234"), to determine whether it discriminates in favor of local interests to the derogation of the free flow of interstate commerce.

As recognized by the majority, the seminal case setting forth the mode of analysis under the Commerce Clause is *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). In that case the Supreme Court overruled a series of cases which had held that any state tax on "the privilege of doing business" imposed on a multi-state business was *per se* unconstitutional. *See, e.g., Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed. 573 (1951); *Freeman v. Hewit*, 329 U.S. 249, 67 S.Ct. 274, 91 L.Ed. 265 (1946). The Court favored an approach which looked to the practical effect of the challenged state tax statute. *Complete Auto Transit, Inc. v. Brady*,

supra 430 U.S. at 279, 97 S.Ct. at 1079. Under this approach a tax is sustained against a Commerce Clause challenge when it (1) is applied to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discrimnate against interstate commerce, and (4) is fairly related to the services provided by the state. *Id. See also Maryland v. Louisiana*, 451 U.S. 725, 754, 101 S.Ct. 2114, 2133, 68 L.Ed.2d 576 (1981), *citing Washington Revenue Dept. v. Washington Stevedoring Assn.*, 435 U.S. 734, 750, 98 S.Ct. 1388, 1399, 55 L.Ed.2d 682 (1978).

It is only when all four conditions of *Complete Auto Transit, Inc. v. Brady, supra*, are met that a state tax is not *per se* invalid because it burdens interstate commerce, since interstate commerce may constitutionally be made to pay its way. *Maryland v. Louisiana, supra* 451 U.S. at 754, 101 S.Ct. at 2133. As stated in *Maryland*:

> A state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme. "In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Best & Co. v. Maxwell*, 311 U.S. 454, 455-456 [61 S.Ct. 334, 335, 85 L.Ed. 275] (1940). See *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 69 [83 S.Ct. 1201, 1203, 10 L.Ed.2d 202] (1963); *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 478-480 [52 S.Ct. 631, 633-635, 76 L.Ed. 1232] (1932).
>
> *Maryland v. Louisiana, supra*, 451 U.S. at 756, 101 S.Ct. at 2134.

This standard was succinctly phrased by the Commonwealth Court in *American Trucking II*, 87 Pa.Commw. 379, 487 A.2d 465 (1985):

> Commerce Clause jurisprudence distinguishes between two types of legislation: (1) protectionist measures that are infused with discriminatory purpose or effect and (2) facially neutral acts that regulate evenhandedly to promote legitimate local interests, with incidental effects on interstate commerce. *See Philadelphia v. New Jersey*, 437 U.S. 617, 624 [98 S.Ct. 2531, 2535, 57 L.Ed.2d 475] (1978). Economic protectionist legislation is subject to a "virtually *per se* rule of invalidity," while a facially neutral measure is invalidated whenever burdens on interstate commerce clearly outweigh putative local benefits. *Id.*
>
> *Id.* 87 Pa.Commw. at 382, 487 A.2d at 467.

It is therefore incumbent upon the reviewing court to determine whether the challenged statute, in practical operation, works discrimination against interstate commerce in purpose or effect.

Turning to the statute challenged in *American Trucking II*, I believe the majority incorrectly focuses upon the plethora of rationalizations submitted in support of the Axle Tax rather than the practical operation of the Axle Tax itself. Section 3 of Act 234 assessed a maximum tax of thirty-six (36) dollars per axle against both foreign-registered and Pennsylvania registered motor carrier vehicles that travel at least two thousand (2000) miles annually in Pennsylvania having a gross weight or registered gross weight in excess of twenty-six thousand (26,000) pounds. Section 1 of Act 234, however, simultaneously amended section 1916(a) of the Vehicle Code, 75 Pa. C.S. § 1916(a), and beginning with the weight class upon which the Axle Tax is first imposed (twenty-six thousand (26,000) pounds) reduced the annual Penn-

sylvania truck registration fees in multiples of thirty-six (36) dollars.[1]

The Commonwealth Court found that "[w]hile Section 3 of Act 234 assesses an Axle Tax against all designated vehicles operating in Pennsylvania, Section 1 of Act 234, by authorizing comparable registration fee reductions,

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[1] The reductions correspond to the number of axles most commonly used and minimally required by law in each weight class. *See* 75 Pa. C.S. § 4941. The following schedule is illustrative:

CLASS	WEIGHT	AMOUNT REDUCED
9	26,001-30,000	$ 72
10	30,001-33,000	72
11	33,001-36,000	72
12	36,001-40,000	72
13	40,001-44,000	108
14	44,001-48,000	108
15	48,001-52,000	108
16	52,001-56,000	108
17	56,001-60,000	108
18	60,001-64,000	144
19	64,001-68,000	144
20	68,001-73,280	144
21	73,281-76,000	180
22	76,001-78,000	180
23	78,001-78,500	180
24	78,501-79,000	180
25	79,001-80,000	180

Except in a few instances, the reductions created by the Act were intended to and did exactly offset the impact of the Axle Tax upon motor carrier vehicles registered in Pennsylvania. For example, under the annual registration fee schedule in force just prior to the Act, a five-axle truck tractor and trailer combination registered in Pennsylvania for a maximum weight of 80,000 pounds was subject to a one-year registration fee of $1125. For the 1983 Axle Tax registration year, that same five-axle combination still was only subject to a total fee of $1125. The reduced registration fee was $945 and the five-axle combination was subject to a tax of $36 per axle, or an Axle Tax of $180. The total ($945 + $180 = $1,125) is exactly the same amount as the registration fee prior to the passage of the Act.

negates or mitigates the financial impact of the Axle Tax on Pennsylvania-registered vehicles." *See American Trucking II, supra* at 382, 487 A.2d at 467. The court concluded that Act 234 amounted to economic protectionist legislation which facially discriminated against interstate commerce. *Id., quoting Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978); *Maryland v. Louisiana, supra.* I agree.

Appellants concede the unequal financial impact of Act 234. Appellants' Brief at 12. The primary thrust of appellants' argument is that the legislative purpose behind Act 234 was to effect a rational restructuring of Pennsylvania's highway user charges. *Id.* at 17-18. Appellants place great weight upon the fact that Act 234 impacts the most upon those vehicles which have in the past not paid any Pennsylvania registration fees, *i.e.*, out-of-state vehicles not participating in the IRP program. *Id.* at 16-17. Appellants also argue that both before and after the enactment of Act 234, Pennsylvania registered trucks pay more money to Pennsylvania for the privilege of using its roads than do vehicles registered elsewhere. *Id.* at 19. Additionally, appellants contend that the restructuring effected by Act 234 will attract more vehicle registration in Pennsylvania. *Id.* at 20. Nevertheless, as the following Commerce Clause analysis as set forth by decisions of the United States Supreme Court demonstrates, appellants' factual assertions as to the purpose of Act 234 do not raise that act, which on its face discriminates against interstate commerce, to a level of constitutionality.

The basic fallacy of the majority's analysis is its acceptance of appellants' premise that the legislative purpose of Act 234 was to restructure Pennsylvania's highway user charges. It is notable, however, that there is nothing in the statute itself or in the circumstances surrounding the enactment of Act 234 which adds legitimacy to appellants' position that it was designed to restructure the tax burden upon the trucking industry in

this Commonwealth. In fact, the legislature expressed a clearly parochial purpose, the rehiring of Pennsylvania's unemployed, for the enactment of the Axle Tax. Section 9907(b) of the tax states:

> (b) Purpose of tax.—It is the declared policy of the Commonwealth that the money raised by the tax imposed by this chapter be used, to the greatest extent possible, *to provide for the creation of jobs and the rehiring of the unemployed in this Commonwealth.* In order to reach this goal, firms with *Pennsylvania-based facilities* shall be actively solicited to make bids on contracts to furnish products and materials, including, but not limited to, steel and steel products, to be used in the projects funded through the Highway Bridge Improvement Restricted Account.
>
> 75 Pa.C.S. § 9907(b) (emphasis added).

Thus, appellants' argument that the purpose of the Axle Tax was to effect a rational restructuring of tax burdens is specious, and the majority's reliance upon this assertion rises to no higher level. Moreover, even though the Commonwealth has a legitimate interest in providing employment for Pennsylvanians, I find that in the instant case the state chose an unconstitutional means to effect this goal.

In *Philadelphia v. New Jersey*, *supra*, the State of New Jersey raised the argument that its statute prohibiting the importation of most solid or liquid waste which originated or was collected outside the territorial limits of the State was actually no more than a legislative effort to suppress competition and to stabilize the cost of solid waste disposal for New Jersey residents. *Id.* at 626, 98 S.Ct. at 2536. In answer to this argument on legislative purpose, the Supreme Court wrote:

> *This dispute about ultimate legislative purpose need not be resolved, because its resolution would not be*

> *relevant to the constitutional issue to be decided in this case.* Contrary to the evident assumption of the state court and the parties, the evil of protectionism can reside in legislative means as well as legislative ends. Thus, it does not matter whether the ultimate aim . . . is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment. And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of all waste into the State's remaining landfills, even though interstate commerce may incidentally be affected. *But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against article of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently. Both on its face and in its plain effect* [*this statute*] *violates this principle of nondiscrimination.*
>
> *Id.* at 626-27, 98 S.Ct. at 2536-37 (emphasis added).

The Supreme Court of the United States has consistently found parochial legislation such as Act 234 invalid, regardless of the ultimate legislative goal. *See, e.g., Toomer v. Witsell*, 334 U.S. 385, 403-04, 68 S.Ct. 1156, 1165-66, 92 L.Ed. 1460 (1948) (goal to create jobs by keeping industry within the State); *Edwards v. California*, 314 U.S. 160, 173-74, 62 S.Ct. 164, 166-67, 86 L.Ed. 119 (1941) (attempt to preserve the State's financial resources from depletion by fencing out indigent immigrants); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522-24, 55 S.Ct. 497, 500-01, 79 L.Ed. 1032 (1935) (aim was to assure a steady supply of milk by erecting barriers to allegedly ruin outside competition). These cases show that the presence of a presumably legitimate goal, *i.e.*, rehiring of unemployed Pennsylvanians, does not constitutionalize a state statute which operates to discrimi-

nate against vehicles solely because of their origin. Act 234, by effecting a tax burden only upon those out-of-state vehicles with no financial nexus to Pennsylvania's registration fee, imposes a tax based solely upon out-of-state origin.

In response to the majority's observations that Act 234 impacts most upon out-of-state vehicles which have not in the past paid any of Pennsylvania's registration fee, and that the "reallocation" effected by Act 234 will attract more vehicle registration in Pennsylvania, I counter that these observations do nothing more than to demonstrate the discriminatory nature of Act 234. As I previously quoted, "[t]he basic purpose of the Commerce Clause is to prohibit a state from taxing interstate commerce in a manner which discriminates against interstate commerce 'by providing a direct commercial advantage to local business.'" *Northwestern States Portland Cement Co. v. Minnesota*, *supra*, 358 U.S. at 458, 79 S.Ct. at 362. State legislatures can neither protect local businesses nor seek to induce businesses to locate in the state by way of burdening only interstate commerce. *See Maryland v. Louisiana*, *supra*; *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977); *Best & Co., Inc. v. Maxwell*, 311 U.S. 454, 61 S.Ct. 334, 85 L.Ed. 275 (1940). Thus, the majority's observations manifest the very evils the Commerce Clause was designed to protect against.

The majority relies heavily on the fact that Pennsylvania-registered vehicles pay more fees to Pennsylvania than do out-of-state registered vehicles. What the majority ignores, however, is that every state maintains a system for registering trucks and every state imposes fees and taxes in conjunction with such registration. Just as Pennsylvania-registered vehicles pay a registration fee to the state of Pennsylvania, so do out-of-state registered vehicles pay such a fee in their respective jurisdictions. Naturally, a state has a rational basis for exacting more

fees from in-state-registered vehicles than from out-of-state registered vehicles. Thus, the majority's revelation of the "operative fact" that Pennsylvania-registered vehicles are subject to $940.00 in registration fees which the foreign-registered, non-IRP counterparts are not subject to, comes as no startling surprise. The practical operation of Act 234, which does not restructure the entire Pennsylvania user fee system, does not serve to achieve equal treatment, rather it serves instead to shift an additional financial burden *only* upon interstate commerce.[2] The protectionist nature of this legislation is evident and cannot be ignored. Should every state impose such a tax to burden only out-of-state registered vehicles, the impact upon interstate commerce would indeed be crippling.[3]

Appellants attempt to hinge the legal determination of the constitutionality of Act 234 upon the fact that Pennsylvania is a member of the IRP, an interstate compact. Those out-of-state vehicles participating in the IRP program are also benefited by the decrease in the registration fees under Act 234. This argument erroneously assumes that the Commerce Clause analysis is somehow based upon the percentage of discrimination effected by the statute. *See Maryland v. Louisiana, supra* 451 U.S.

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[2] The majority's reasoning leads them to the inherently inconsistent statement that the "easing" of the burden on Pennsylvania registered vehicles does not favor local commerce. *See* p. 855. Earlier in the majority opinion it is noted that in reducing the Pennsylvania registration fees, it was "intended to lessen the burden imposed upon 'local commerce.'" *Id.* at 853.

[3] Moreover, contrary to the majority's implication that the out-of-state registered vehicles have in the past received a "free ride" on the roads of Pennsylvania, foreign registered vehicles are subject to payment of *inter alia:* (a) special hauling permit fees; (b) the Fuel Use Tax; (c) the Motor Carrier's Road Tax; (d) the Oil Company Franchise Tax; (e) the Gross Receipt Tax; and (f) the Liquid Fuels Tax. Joint Stipulation of Facts at R. 308-09.

at 760, 101 S.Ct. at 2136.[4] As the following facts demonstate, however, the discrimination effected by Act 234 is substantial, notwithstanding, or rather because of, the presence of the compact.

Vehicles registered in IRP jurisdictions pay to each member state in which the vehicle travelled that year, a percentage of the state's registration fee apportionally related to the miles travelled in that state compared to the vehicle's total mileage for that year. Of the total 403,656 vehicles upon which the 1983 axle tax was paid, 83,118 (21%) were Pennsylvania-registered and 126,466 (31%) were from other IRP jurisdiction. *See* Letter from the Office of the Attorney General, dated May 1, 1984 at R. 321, *et seq.* The remaining 194,072 (48%) vehicles upon which the Axle Tax was paid by residents of non-IRP jurisdictions who owned out-of-state registered vehicles. *Id.* The large size of this latter figure is explained by the fact that Pennsylvania, although an IRP state, is completely surrounded by non-IRP jurisdictions.

Hence, those jurisdictions most immediate to Pennsylvania and most likely to travel on Pennsylvania highways are fully impacted by the Axle Tax. Those out-of-state vehicles derive no benefit from the corresponding decrease in registration fees under Act 234, and pay Axle Tax fees to further the parochial purpose of providing employment for Pennsylvania residents. By contrast, Pennsylvania-registered vehicles as well as those vehicles participating in the IRP program are practically fully exempt from the tax because of the corresponding decrease in registration fees under Act 234.

The legal issue presented by the case at bar is synonymous with that presented in *Maryland v. Louisiana*, *supra*, which involved Louisiana's tax on the "first use"

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[4] In *Maryland v. Louisiana*, 451 U.S. 725, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981), the Supreme Court wrote, "[w]e need not know how unequal the Tax is before concluding that it unconstitutionally discriminates." *Id.* at 760, 101 S.Ct. at 2136.

of any natural gas brought into Louisiana which was not previously subjected to taxation by another State or the United States. The primary effect of the tax, which was imposed on pipeline companies, was on gas produced in the Federal Outer Continental Shelf (OCS) and then piped to processing plants in Louisiana and, for the most part, eventually sold to out-of-state consumers. The first-use tax statute (Act) as well as provisions of other Louisiana statutes, provided a number of exemptions from and credits for the tax whereby Louisiana consumers of OCS gas for the most part were not burdened by the tax, but it uniformly applied to gas moving out of the State.

The Supreme Court of the United States found Louisiana's First Use Tax unconstitutional under the Commerce Clause using the following analysis:

> *In this case, the Louisiana First-Use Tax unquestionably discriminates against interstate commerce in favor of local interests as the necessary result of various tax credits and exclusions. No further hearings are necessary to sustain this conclusion.* Under the specific provisions of the First-Use Tax, OCS gas used for certain purposes within Louisiana is exempted from the Tax. . . . Competitive users in other States are burdened with the Tax. Other Louisiana statutes, enacted as part of the First-Use Tax package, provide important tax credits favoring local interests. Under the Severance Tax Credit, an owner paying the First-Use Tax on OCS gas receives an equivalent tax credit on any state severance tax owed in connection with production in Louisiana. . . . *On its face, this credit favors those who both own OCS gas and engage in Louisiana production. The obvious economic effect of this Severance Tax Credit is to encourage natural gas owners involved in the production of OCS gas to invest in mineral exploration and development within Louisiana rather than to in-*

> *vest in further OCS development or in production in other states.* Finally, under the Louisiana statutes, any utility producing electricity with OCS gas, any natural gas distributor dealing in OCS gas, or any direct purchaser of OCS gas for consumption by the purchaser in Louisiana may recoup any increase in the cost of gas attributable to the First-Use Tax through credits against various taxes or a combination of taxes otherwise owed to the State of Louisiana. . . . Lousiana consumers of OCS gas are thus substantially protected against the impact of the First Use Tax. . . . OCS gas moving out of the State, however, is burdened with the First-Use Tax.
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> 451 U.S. at 756-58, 101 S.Ct. at 2134-35 (footnote omitted, emphasis added).

The above analysis is persuasive that Act 234 facially discriminates against interstate commerce by virtually insulating operators of locally, but not foreignly registered vehicles from its financial impact. Like the Louisiana scheme, the Pennsylvania Axle Tax directly discriminates in favor of local interests. The reductions in multiples of thirty-six (36) dollars correspond to the number of axles ordinarily required on vehicles within each affected weight class. The result is that in almost all instances, the registration fee reductions exactly offset the impact of the Axle Tax upon carriers operating vehicles that are registered in Pennsylvania. The practical effect of the reductions is to exempt Pennsylvania-registered vehicles from the Axle Tax.

Two recent decisions of the Supreme Court of the United States also mandate a finding of unconstitutionality in the instant case. In *Bacchus Imports, Ltd. v. Dias, Director of Taxation of Hawaii*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984), the state of Hawaii imposed a 20% excise tax on sales of liquor at wholesale. To encourage the development of the Hawaiian liquor industry, however, a brandy distilled from the root of

an indigenous shrub of Hawaii, and a fruit wine manufactured in the State were exempted from the tax. The Supreme Court held that the tax exemption for the brandy and the fruit wine violated the Commerce Clause because it had both the purpose and effect of discriminating in favor of local products. The Court found it insignificant that the sales of the exempted beverages constituted only a small part of the total liquor sales in Hawaii. It stated that as long as there is some competition between the exempt beverages and the non-exempt products from outside the State, there was a discriminatory effect. The Court also stated that it is irrelevant to the Commerce Clause inquiry that the legislature's motivation was the desire to aid the makers of the locally produced beverages rather than to harm out-of-state producers.

Similarly, in *Westinghouse Electric Corporation v. Tully*, 466 U.S. 388, 104 S.Ct. 1856, 80 L.Ed.2d 388 (1984), the Court held unconstitutional a New York tax scheme which not only provided an incentive for increased business activity in New York, but also penalized increases in shipping activities in other states. The Court held that whether the New York tax diverted new business into the State or merely prevented current business from being diverted elsewhere, it was still a discriminatory tax that creates an advantage for firms operating in New York by placing a discriminatory burden on commerce to its sister states.

Under the standard set forth in *Complete Auto Transit, Inc. v. Brady, supra*, a statute which discriminates against interstate commerce cannot be sustained. As previously noted, "[a] state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme." *Maryland v. Louisiana, supra* 451 U.S. at 756, 101 S.Ct. at 2134. The key determination is whether, in practical effect, the statute will work discrimination against interstate commerce.

Complete Auto Transit, Inc. v. Brady, *supra* 430 U.S. at 279, 97 S.Ct. at 1079; *Best & Co. v. Maxwell*, *supra* 311 U.S. at 455-56, 61 S.Ct. at 334-35. Here, although the thirty-six (36) dollar per axle is a tax imposed upon all vehicles of designated classes, whether foreign or Pennsylvania registered, the corresponding reductions in Pennsylvania registration fees demonstrate a legislative intent to provide a direct commercial advantage to local business. *See Northwestern States Portland Cement Co. v. Minnesota*, *supra*, 358 U.S. at 458, 79 S.Ct. at 362. I thus conclude that Act 234 is a protectionist measure infused with discriminatory purpose and effect. *See Philadelphia v. New Jersey*, *supra*. As the Supreme Court observed in *Best & Co., Inc. v. Maxwell*, *supra*, "[t]he Commerce Clause forbids discrimination, whether forthright or ingenious." *Id.* 311 U.S. at 455, 61 S.Ct. at 335.

Accordingly, I would affirm the order of the Commonwealth Court entered in *American Trucking II*, docketed at No. 12 M.D. Appeal Docket 1985, and hold that the Axle Tax is unconstitutional to the extent that it discriminates against interstate commerce by providing a direct commercial advantage to Pennsylvania-registered truckers.

McDERMOTT, J., joins in this concurring and dissenting opinion.

APPENDIX B

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

Nos. 11, 12 & 19 M. D. Appeal Dockets 1985

AMERICAN TRUCKING ASSOCIATION[S], INC., *et al.*

v.

JAMES I. SCHEINER, Secretary of the Department of Revenue, *et al.*

JUDGMENT

On CONSIDERATION WHEREOF, it is hereby ordered and adjudged by this Court that the orders are entered pursuant to paragraph VI, page 41 of the Majority Opinion.

/s/ Mildred E. Williamson
Deputy Prothonotary

Dated: May 6, 1986

APPENDIX C

COMMONWEALTH COURT OF PENNSYLVANIA

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners,

v.

ROBERT K. BLOOM, SECRETARY OF THE DEPARTMENT OF REVENUE OF THE COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

Argued Dec. 11, 1984

Decided Feb. 5, 1985

Before CRUMLISH, Jr., President Judge, and ROGERS, WILLIAMS, CRAIG, MacPHAIL, DOYLE and BARRY, JJ.

WILLIAMS, Judge.

Before this Court are respondents' [1] exceptions to Judge Robert W. Williams, Jr.'s Memorandum Opinion and Order of October 17, 1983. We dismiss the exceptions and affirm the order.

American Trucking Associations, Inc. and two foreign-based interstate motor carrier (petitioners) brought an original, class action challenging the constitutionality and seeking to enjoin enforcement of the identification marker fee requirement of Section 2102(b) of the Vehicle Code,

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[1] Respondents include the Commonwealth's Secretary of the Department of Revenue, Attorney General and State Police Commissioner.

75 Pa.C.S. § 2102(b).[2] Petitioners further demand the refunding of all marker fees paid by class members for the year beginning April 1, 1982.

On June 18, 1980, Title 75 of the Vehicle Code was amended by Section 4 of the Act of June 18, 1980, P.L. 229, No. 68 (Act 68), which required that an identification marker, obtainable from the Department of Revenue for $25.00, be affixed to every motor carrier vehicle[3] operating in Pennsylvania. Vehicles bearing identification markers are subject to the record-keeping, reporting and tax-paying requirements of the Motor Carrier Road Tax Act (Road Tax).[4] Operators of Pennsylvania-registered motor carrier vehicles provide notice that they are subject to the Road Tax through registration and are not required to display markers. Respondents' *Brief in Support of Exceptions* at 6 n. 12. Operating a motor carrier vehicle in the Commonwealth without an identi-

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[2] Petitioners represent a class that is certified as consisting of all interstate motor carriers operating foreign-registered vehicles, which are subject to the identification marker requirement of Section 2102(b).

Petitioners also represent a sub-class that is certified as consisting of all interstate motor carriers operating vehicles registered in states or provinces with which Pennsylvania has entered into bilateral apportioned registration reciprocity agreements, which are subject to the identification marker requirement of Section 2102(b).

[3] A "motor carrier vehicle" is defined as "[a] truck, truck tractor or combination having a gross weight or registered gross weight in excess of 17,000 pounds." Section 102 of the Vehicle Code, 75 Pa. C.S. § 102.

[4] Act of June 19, 1964, P.L. 7, *as amended*, 72 P.S. §§ 2617.1-2617.26. The Road Tax is assessed against certain liquid fuels, including gasoline and diesel fuel, calculated on the amount of fuel purchased outside of, but consumed inside, Pennsylvania. Fuel purchased in Pennsylvania but consumed elsewhere is excluded. The tax rate is eleven (11) cents per gallon plus three point five percent (3.5%) of the average wholesale price of the purchased fuel.

fication marker is unlawful. Section 2102(d) of the Vehicle Code, 75 Pa.C.S. § 2102(d).

Before Section 1 of the Act of December 8, 1982, P.L. 842, No. 234 (Act 234) amended Section 2102(b) and reduced the marker fee to $5.00 (effective April 1, 1983), Sectionn 2102(b) provided:

> (b) Fee.—The fee for issuance of an identification marker shall be $25, except that for vehicles registered in this Commonwealth, the vehicle identification marker fee shall be deemed a part of and included in the vehicle registration fee.

The marker fee is a tax for the privilege of using Pennsylvania's roads. One-fifth of the tax pays the administrative costs of issuing identification markers,[5] and the balance is credited to the Motor License Fund for highway construction and maintenance, the state police and construction bond debt service. *See* J.S.F. No. 46. While operators of foreign-registered vehicles actually paid the $25.00 marker fees for 1981 and 1982 (payments which totaled approximately ten million dollars in 1981), Pennsylvania-registered motor carriers had the marker fee "deemed a part of and included in [their] vehicle registration fee[s]."

At trial petitioners asserted that the Legislature, by cleverly "deeming" the marker fee to be part of and included in the Pennsylvania registration fee, intended to —and did—impose the full tax burden on foreign-registered motor carriers while exempting Pennsylvania-registered motor carriers. Petitioners challenged the marker fee as repugnant to the United States Constitution's Commerce Clause, art. I, § 8, cl. 3; Privileges and Im-

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[5] Petitioners do not challenge the constitutionality of Section 2102(b), *as amended* by Act 234, because the $5.00 marker fees equal the stipulated costs of administering the identification marker program. *See* Joint Stipulation of Facts (J.S.F.) No. 6.

munities Clause, art. IV, § 2; Equal Protection Clause, amend. XIV; and the Uniformity Clause of the Pennsylvania Constitution, art. VIII, § 1.

Although the parties entered into an extensive factual stipulation, a trial was held regarding the validity of petitioners' survey, which purported to establish the marker fee's discriminatory impact on foreign-registered motor carriers. The Commonwealth also presented evidence relevant to truck-induced road deterioration and costs. The trial judge, after reviewing the stipulation and contemporaneous legislative history of the marker fee provision, concluded that Section 2102(b) offended the Commerce Clause by facially discriminating against foreign-registered motor carriers which, given the exemption ingeniously accorded Pennsylvania-registered motor carriers, exclusively bore the financial burden. *American Trucking Associations, Inc. v. Bloom*, 77 Pa. Commonwealth Ct. 575, 466 A.2d 755 (1983).

Respondents filed exceptions to the trial judge's decision, arguing (among other things) that Section 2102(b) passes constitutional muster because Act 68, which created the $25.00 marker fee, also increased registration fees for Pennsylvania-based motor carrier vehicles from $45.00 to $228.00, depending on the weight classification. *See* Section 2 of Act 68 *amending* Section 1916(a) of the Vehicle Code, 75 Pa.C. § 1916(a).

Notwithstanding the vague "deemed"[6] language of Section 2102(b), the issue is whether the Legislature intended to, and actually did, incorporate the $25.00 marker fee when it increased Pennsylvania-based motor carrier vehicle registration fees under Act 68.

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[6] The verb "to deem" is defined pertinently as "to come to view, judge or classify: [h]old, [t]hink." Webster's Third New International Dictionary 589 (1966).

Our review of Act 68's contemporaneous legislative history [7] reveals a sequence of events that evince a legislative intent to exempt Pennsylvania-registered vehicles from the marker fee levy. While Act 68 increased motor carrier vehicle registration fees by amounts ranging from $45.00 to $228.00, these increments do not, and were not intended to, include the later-introduced $25.00 marker fee.

Act 68's precursor, Senate Bill No. 10 (Printer's No. 965), significantly raised motor carrier vehicle registration fees, without including a marker fee provision, when first reported from Transportation Committee on June 25, 1979. On July 10, 1979, a $5.00 identification marker decal provision was added to Senate Bill No. 10 (Printer's No. 1038). When the $25.00 marker fee was subsequently introduced in Senate Bill No. 10 (Printer's No. 1834), which was reported from Conference Committee on May 27, 1980, the motor carrier vehicle registration fees were never increased to reflect the newly added privilege tax. Moreover, the registration cost for vehicles weighing between 68,001 to 73,280 pounds was reduced by $41.00. Since the Legislature never increased registration fees in response to the subsequent $25.00 marker levy, we divine a legislative intent to exempt Pennsylvania-registered motor carriers from payment of the $25.00 marker fee.

Local taxation of interstate commerce does not violate the Commerce Clause when the levy (1) is applied to an activity with a substantial nexus to the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce and (4) is fairly related to local services. *Complete Auto Transit, Inc. v. Brady*, 430 U.S.

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[7] Section 1921(c)(7) of the Statutory Construction Act of 1972, 1 Pa. C.S. § 1921(c)(7), permits consideration of an act's contemporaneous legislative history when, as here, statutory language is not explicit.

274, 279, 97 S.Ct. 1076, 1079, 51 L.Ed.2d 326 (1977). A state tax's validity under the Commerce Clause must be measured by the statute's actual effect on interstate commerce in the context of the state's entire, interrelated taxing scheme. *Maryland v. Louisiana*, 451 U.S. 725, 756, 101 S.Ct. 2114, 2134, 68 L.Ed.2d 576 (1981) (Louisiana's "first-use" tax on natural gas invalidated because local users benefited by a series of exemptions and credits).

Section 2102(b) facially offends the third prong of the *Complete Auto* standard, which proscribes discrimination against interstate commerce. Notwithstanding the Legislature's clever insertion of the "deemed" language, our review of the contemporaneous legislative history of Section 2102(b) persuades us that the Legislature intended to, and actually did, exclude Pennsylvania-registered motor carriers from the financial impact of the marker levy. "The commerce clause forbids discrimination, whether forthright or ingenious." *Best & Co. v. Maxwell*, 311 U.S. 454, 455, 61 S.Ct. 334, 335, 85 L.Ed. 275 (1940) (footnote omitted).

Since Section 2102(b) facially discriminates against foreign-registered motor carrier vehicle operators and in favor of Pennsylvania-registered motor vehicle operators in violation of the Commerce Clause, the additional exceptions need not be addressed.

Accordingly, respondents' exceptions are overruled.

CRUMLISH, Jr., President Judge, and BARRY, J., dissent.

ORDER

AND NOW, this 5th day of February, 1985 Respondents's exceptions to the Opinion and Order of Judge Robert W. Williams, Jr., dated October 17, 1983, are overruled.

APPENDIX D

COMMONWEALTH COURT OF PENNSYLVANIA

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners,

v.

ROBERT K. BLOOM, SECRETARY OF
DEPARTMENT OF REVENUE,
COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

Argued Dec. 11, 1984

Decided Feb. 5, 1985

Before CRUMLISH, Jr., President Judge, and ROGERS, WILLIAMS, CRAIG, MacPHAIL, DOYLE and BARRY, JJ.

WILLIAMS, Judge.

American Trucking Associations, Inc. and four foreign-based trucking companies (Petitioners) challenge the constitutionality and seek to enjoin the enforcement of Section 9902 of the Vehicle Code, 75 Pa.C.S. § 9902, which exacts a maximum, annual tax of $36.00 per axle on every motor carrier vehicle, beyond a certain weight, that travels in the Commonwealth. In this class action Petitioners also request the refunding to class members of taxes paid for tax years beginning April 1, 1983.[1] The parties have filed cross-motions for summary judgment.

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[1] This Court, on December 12, 1983, certified the represented class to consist of all interstate carriers who own foreign-registered

Section 3 of the Act of December 8, 1982, P.L. 842, No. 234 (Act 234), amended the Vehicle Code by adding a chapter entitled "Axle Tax for Highway Bridge Improvement" (Axle Tax). *See* 75 Pa.C.S. §§ 9901-09. The Axle Tax, with an effective date of April 1, 1983, imposes annually a $36.00 per axle assessment "on every truck, truck tractor or combination having a gross weight or registered gross weight in excess of 26,000 pounds" that travels at least 2000 miles annually in Pennsylvania.[2] *See* 75 Pa.C.S. §§ 9902 and 9905. Axle Tax revenue funds highway bridge rehabilitation, replacement and removal projects, 75 Pa.C.S. § 9908, and is targeted for job-creation and the rehiring of the Commonwealth's unemployed, 75 Pa.C.S. § 9907(b).

Section 3 of Act 234 assessed a maximum tax of $36.00 per axle against both foreign-registered and Pennsylvania-registered motor carrier vehicles that travel in the Commonwealth and have a gross or registered gross weight greater than 26,000 pounds. Section 1 of Act 234, however, simultaneously amended Section 1916(a) of the Vehicle Code, 75 Pa.C.S. § 1916(a), and, beginning with the weight class upon which the Axle Tax is first imposed (*viz*, 26,001-30,000 pounds), reduced the annual, Pennsylvania truck registration fees in multiples of $36.00.

The incremental $36.00 registration fee reductions roughly correspond to the number of axles legally required for vehicles of various weights. Permissible maximum gross weights for two-axle, three-axle and four-axle

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motor carrier vehicles which are currently or prospectively subject to Section 9902 of the Vehicle Code.

Also certified was a subclass consisting of all interstate carriers who own motor carrier vehicles which are registered in non-International Registration Plan jurisdictions and which are currently or prospectively subject to Section 9902 of the Vehicle Code.

[2] Operators of motor carrier vehicles traveling less than 2000 miles per year in Pennsylvania are entitled to a rebate, which is calculated according to a statutory formula. *See* 75 Pa. C.S. § 9905.

trucks are 38,000 pounds, 58,400 pounds and 73,280 pounds, respectively. *See* 75 Pa.C.S. § 4941(c). Vehicles registered with maximum gross or combination weights of 26,001-40,000 pounds, 40,001-60,000 pounds, 60,001-73,280 pounds and 73,281-80,000 pounds, sustained registration fee reductions in amounts of $72.00, $108.00, $144.00 and $180.00, respectively. Registration fee reductions generally offset the tax owed based on the number of axles ordinarily required of vehicles within each affected weight class.[3]

While Section 3 of Act 234 assesses an Axle Tax against all designated vehicles operating in Pennsylvania, Section 1 of Act 234, by authorizing comparable registration fee reductions, negates or mitigates the financial impact of the Axle Tax on Pennsylvania-registered vehicles. Petitioners therefore argue that the combined effect of Sections 1 and 3 of Act 234, which vitiates the Axle Tax's financial effect on locally registered trucks, discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution, art. I, § 8, cl. 3 and the Privileges and Immunities Clause, art. IV, § 2.

Commerce Clause jurisprudence distinguishes between two types of legislation: (1) protectionist measures that are infused with discriminatory purpose or effect and (2) facially neutral acts that regulate evenhandedly to promote legitimate local interests, with incidental effects on interstate commerce. *See Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S.Ct. 2531, 2535, 57 L.Ed.2d 475 (1978). Economic protectionist legislation is subject to a "virtually per se rule of invalidity," while a facially neutral measure is invalidated whenever burdens on in-

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[3] The correspondence between registration fee reductions and the number of axles is not perfect. For example, trucks weighing between 38,001 and 40,000 pounds are required to have three axles, yet registration fees were reduced by $72.00 rather than $108.00.

terstate commerce clearly outweigh putative local benefits. *Id.*

The United States Supreme Court stated in *Maryland v. Louisiana*, 451 U.S. 725, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981) that

> [a] state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.'

451 U.S. at 756, 101 S.Ct. at 2134 (quoting partially from *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56, 61 S.Ct. 334, 334-35, 85 L.Ed. 275 (1940).

Examining the Axle Tax in conjunction with the simultaneously enacted registration fee reductions, we conclude that the assessment facially discriminates against interstate commerce. The registration fee reductions almost always offset assessments, virtually insulating operators of locally but not foreign, registered vehicles from the levy's financial impact. Since the Axle Tax discriminatorily affects the operators of foreign-registered vehicles, who bear the full brunt of the tax, the assessment constitutes economic protectionism and is facially invalid. *See Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977) (New York stock transfer tax scheme invalidated because it reduced tax payable by non-residents when the transfer involved an in-state sale, and also set a maximum limit to the tax payable on an in-state, but not on an out-of-state, sale.); *Maryland*, 451 U.S. 725, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981) (Louisiana's "first-use" tax on natural gas invalidated because in-state purchasers favored by series of tax credits and exemptions.).

Accordingly, we grant Petitioners' motion for summary judgment and deny the Respondents' cross-motion for summary judgment.[4]

ORDER

AND NOW, this 5th day of February, 1985, Petitioner's motion for summary judgment is granted. Respondent's cross-motion for summary judgment is denied. Section 9902 of the Vehicle Code, 75 Pa.C.S. § 9902, is hereby declared to be violative of the Commerce Clause of the United States Constitution.

Refunding of Axle Tax payments for tax years beginning April 1, 1983 shall proceed in accordance with the parties' Stipulations dated February 9, 1983, February 23, 1984, and, January 16, 1985.

CRUMLISH, Jr., President Judge, and BARRY, J., dissent.

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[4] Because of our disposition of the Commerce Clause, facial discrimination issue, we need not address Petitioners' remaining arguments.

APPENDIX E

COMMONWEALTH COURT OF PENNSLYVANIA

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners,

v.

JAMES I. SCHEINER, SECRETARY OF THE DEPARTMENT OF REVENUE OF THE COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

Argued Dec. 11, 1984
Order Feb. 7, 1985
Opinion March 21, 1985

Before CRUMLISH, Jr., President Judge, and ROGERS, WILLIAMS, CRAIG, MacPHAIL, DOYLE and BARRY, JJ.

ORDER

Respondents' preliminary objection in the above captioned matter is hereby sustained.

OPINION

MacPHAIL, Judge.

American Trucking Associations, Inc. and two foreign-based interstate motor carriers (Petitioners) bring an original action[1] for equitable and declaratory relief, seeking a refund of taxes paid for identification markers

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[1] *See* Section 761(a)(1) of the Judicial Code, 42 Pa. C.S. § 761(a)(1).

pursuant to Section 2102(b) of the Vehicle Code, *as amended*, 75 Pa.C.S. § 2102(b) (Vehicle Code). Petitioners, on behalf of themselves and others similarly situated, demand a refund of all marker fees paid for the period between August 18, 1980 to April 1, 1982.

In a companion case, *American Trucking Associations, Inc. v. Bloom*, —— Pa. Commonwealth Ct. ——, 487 A.2d 468 (1985), this Court held that Section 2102(b) of the Vehicle Code, which required that every motor carrier vehicle [2] operating in Pennsylvania bear an identification marker, was unconstitutional because it facially discriminated against foreign motor carrier vehicles. Pursuant to Section 2102(b), operators of foreign-registered vehicles had to pay a $25.00 marker fee, while Pennsylvania-registered motor carriers had the marker fee "deemed a part of and included in the vehicle registration fee." Petitioners in that case, however, only demanded refunds of marker fees paid by class members [3] for the year beginning April 1, 1982. Since we have already decided on the constitutionality of the marker fee, the only issue before us is the refund of the marker fees paid between August 18, 1980 to April 1, 1982.

Respondents [4] have preliminarily objected, alleging that this Court does not have jurisdiction over the instant case because Petitioners did not initially seek refunds from the Board of Finance and Revenue (Board), and hence, have not exhausted their administrative remedies.

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[2] A "motor carrier vehicle" is defined as "[a] truck, truck tractor or combination having a gross weight or registered gross weight in excess of 17,000 pounds." Section 102 of the Vehicle Code, 75 Pa. C.S. § 102.

[3] Petitioners in that case certified a class, unlike the present action where a class has yet to be certified.

[4] Respondents include the Commonwealth's Secretary of the Department of Revenue, Attorney General and the State Police Commissioner.

We agree and will sustain Respondent's preliminary objection on this basis.

Section 503 of The Fiscal Code (Code)[5] sets forth the explicit procedures for the refunding of improperly paid taxes. Under Section 503(a) of the Code, the Board has the power to refund taxes, license fees or other moneys improperly paid to the Commonwealth. Under Section 503(a)(4) of the Code, when any tax or other money has been paid which a court of competent jurisdiction has declared to be unconstitutional, a petition for refund to the Board must be filed within five years of the payment. A decision by the Board may be appealed to this Court on a petition for review, Section 503(e) of the Code.

Petitioners argue that the doctrine of exhaustion of administrative remedies is inapplicable in this instance because 1) this Court has subject-matter jurisdiction over Petitioners' claim for refunds from the *Commonwealth* and 2) the statutory remedy is inadequate because the time, expense and delay of proceeding before the Board would be contrary to the goals of judicial economy.[6] Petitioners' first contention is without merit because as we have previously stated, Petitioners have a statutory remedy prescribed in the Code which they must follow *before*

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[5] Act of April 9, 1929, P.L. 343, *as amended*, 72 P.S. § 503.

[6] Petitioners also contend that in *American Trucking Associations, Inc. v. Bloom*, —— Pa. Commonwealth Ct. ——, 487 A.2d 468 (1985), the parties stipulated that "no affected motor carrier will be required to proceed before the Board of Finance and Revenue or otherwise come forward with any type of proof in order to be entitled to such refund" and that this stipulation binds the parties in this action to seek refunds in this Court. We need not reach the merits of this contention since the stipulation in that case is not binding on the case *sub judice*, and in any event the parties could not stipulate to facts affecting the jurisdiction of this Court. *Conyer v. Borough of Norristown*, 58 Pa. Commonwealth Ct. 629, 632, 428 A.2d 749, 751 (1981).

we can review the matter of tax refunds. Addressing Petitioners' second contention, our Supreme Court in *Shenango Valley Osteopathic v. Department of Health*, 499 Pa. 39, 48, 451 A.2d 434, 438 (1982), in clarifying its plurality opinion in *Borough of Green Tree v. Board of Property Assessments*, 459 Pa. 268, 328 A.2d 819 (1974), stated "the doctrine of exhaustion of remedies would not bar equitable intervention where there are both a substantial question of constitutionality *and* the absence of an adequate statutory remedy." In the instant case, this Court has already decided the constitutionality of the marker fees, and Petitioners are not challenging the constitutionality of the Code or the Board's power to administer the refunds.[7] Petitioners, therefore, do not have a substantial question of constitutionality to bar the exhaustion of remedies.

Petitioners argue that there are over 25,000 affected interstate motor carriers who have paid in excess of $9 million in marker fee taxes, which will inevitably cause an extreme delay in the administration of refunds. This alleged class of 25,000 interstate motor carriers has yet to be certified. Petitioners contend that this Court should decide the refund matter because it would promote judicial efficiency. We disagree. This Court has no record of how many interstate motor carriers are involved or what amount of taxes was paid by each affected motor carrier. These matters have been statutorily prescribed

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[7] Section 503(a) of The Fiscal Code, Act of April 9, 1929, P.L. 343, *as amended*, 72 P.S. § 503(a) states in pertinent part:

> The Board of Finance and Revenue shall have the power, and its duty shall be,
>
> (a) Except as hereinafter provided with respect to the Department of Transportation, to hear and determine any petition for the refund of taxes, license fees, penalties, fines, bonuses or other moneys paid to the Commonwealth and to which the Commonwealth is not rightfully or equitably entitled
>
> . . . .

to the Board under the Code and this Court will not prematurely interrupt this administrative process.

Our Supreme Court in *Lilian v. Commonwealth*, 467 Pa. 15, 354 A.2d 250 (1976), addressed a similar argument, when appellants there argued that the statutory remedy of obtaining sales tax refunds under the Code was inadequate because of the numerous taxpayers involved. The Supreme Court in *Lilian* stated "class status or the lack of it is irrelevant to the question whether an action is to be heard in equity or at law or whether, indeed, either form is available in light of the statutory remedy. With no independent basis for equity jurisdiction appellants cannot generate it simply by alleging a class status." *Id.* at 21, 354 A.2d at 254. Likewise, Petitioners here cannot invoke equitable jurisdiction to circumvent their administrative remedy by the mere assertion that numerous interstate motor carriers will have to pursue their refunds under the Code.

Turning now to Petitioners' request for declaratory relief, we note that under the Declaratory Judgments Act (Act), Section 7541(c)(2) of the Judicial Code, 42 Pa. C.S. § 7541(c)(2), "[r]elief shall not be available under this (Act) with respect to any: . . . (p)roceeding within the exclusive jurisdiction of a tribunal other than a court." The Board qualifies as a "tribunal other than a court." *Myers v. Department of Revenue*, 55 Pa. Commonwealth Ct. 509, 513, 423 A.2d 1101, 1103 (1980). Respondents' preliminary objection raising the issue of this Court's jurisdiction is, therefore, sustained.

CRUMLISH, Jr., President Judge, and WILLIAMS, J., dissent.

This decision was reached prior to the resignation of WILLIAMS, J.

APPENDIX F

COMMONWEALTH COURT OF PENNSYLVANIA

AMERICAN TRUCKING ASSOCIATIONS, INC., and OLD DOMINION FREIGHT LINE, INC., and ANDERSON TRUCKING SERVICE, INC., individually and on behalf of a class of interstate motor carriers,

Petitioners,

v.

ROBERT K. BLOOM, SECRETARY OF THE DEPARTMENT OF REVENUE OF THE COMMONWEALTH OF PENNSYLVANIA, and LEROY S. ZIMMERMAN, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, and DANIEL F. DUNN, COMMISSIONER OF THE STATE POLICE OF THE COMMOWEALTH OF PENNSYLVANIA,

Respondents.

Heard Sept. 19, 1983

Decided Oct. 18, 1983

WILLIAMS, Judge.

Petitioner, American Trucking Associations, Inc. and two foreign-based motor carriers,[1] challenge, in this orig-

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[1] By order of Judge MacPhail, dated May 18, 1982, Petitioners were certified as representative parties to a class action. Petitioners' class was defined as "all interstate carriers whose motor carrier vehicles are registered outside of Pennsylvania and are subject to the road tax identification marker requirement of Section 2102 of the Vehicle Code and who now are or may in the future become liable for payment of the yearly marker fee of $25.00 on account of such motor carrier vehicles."

Petitioners were also certified to represent a subclass of affected "interstate carriers whose motor carrier vehicles are registered in any of the states or provinces with which Pennsylvania has

inal action, the constitutionality of Section 2102(b) of the Vehicle Code, 75 Pa.C.S. § 2102(b), which required for years beginning the first of April 1981 and 1982, that motor carrier vehicles (vehicles)[2] operating in Pennsylvania each bear an identification marker issued by Respondent Secretary of Revenue upon payment of $25.00. Petitioners further seek the refunding of all marker decal fees paid by class members for the year beginning April 1, 1982, in accordance with the Stipulation of the parties dated February 25, 1982.

On June 18, 1980, Title 75 of the Vehicle Code was amended by Section 4 of the Act 1980-68 which added, *inter alia*, the requirement that an identification marker be affixed to every motor carrier vehicle subject to the provisions of the Motor Carriers Road Tax Act (Act).[3] Although the amendments mandate that a marker decal be provided "for every motor carrier vehicle," only foreign-registered vehicles are required to bear the marker decals since Pennsylvania-registered vehicles provide the Commonwealth notice that they are subject to the Act through their registration. Respondents' *Memorandum of Law* at 3 n. 6. Operation of a motor carrier vehicle, without an identification marker, in the Commonwealth, is unlawful. Section 2102(d) of the Vehicle Code, 75 Pa.C.S. § 2102 (d).

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entered into bilateral apportioned registration reciprocity agreements."

[2] A "motor carrier vehicle" is defined as "[a] truck, truck tractor or combination having a gross weight or registered gross weight in excess of 17,000 pounds." Section 102 of the Vehicle Code, *as amended*, 75 Pa.C.S. § 102.

[3] Act of June 19, 1964, P.L. 7, *as amended*, 72 P.S. §§ 2617.1-2617.26. The Motor Carriers Road Tax is a levy on certain liquid fuels, including gasoline and diesel fuel, calculated on the amount of fuel purchased outside of Pennsylvania but consumed on Commonwealth roads. Fuel purchased in Pennsylvania but consumed elsewhere is excluded. The tax rate is eleven (11) cents per gallon plus three point five percent (3.5%) of the average wholesale price of the purchased fuel.

Before Section 1 of the Act of December 8, 1982, P.L. 842, No. 234 amended Section 2102(b) of the Vehicle Code lowering the marker decal fee to $5.00 effective April 1, 1983,[4] Section 2102(b) provided:

> (b) Fee.—The fee for issuance of an identification marker shall be $25, except that for vehicles registered in this Commonwealth, the vehicle identification marker fee shall be deemed a part of and included in the vehicle registration fee.

The marker decal levy is a tax imposed for the privilege of using Pennsylvania roads. One-fifth of the tax pays the administrative costs of issuing a decal, the remainder is expended for highway maintenance and construction. Unlike the owners of foreign-registered vehicles who actually paid the $25.00 marker decal fee for 1981 and 1982 (payments totaled approximately ten million dollars in 1981), owners of Pennsylvania-registered vehicles had the marker decal fee "deemed a part of and included in [their] vehicle registration fee[s]."

Petitioners assert that the Legislature, by "deeming" the marker decal fee to be part of and included in the Pennsylvania vehicle registration fee, intended to impose the full tax burden on Petitioners and their class, and therefore exempt the owners of Pennsylvania-registered vehicles from paying the tax. Section 2102(b), Petitioners contend, is therefore unconstitutional under the Commerce Clause of the United States Constitution, Art. 1, § 8, and the Privileges and Immunities Clause, Art. IV, § 2, in that the provision facially discriminates against foreign-registered vehicles, and in favor of Pennsylvania-registered vehicles, by exempting the latter from any financial burden under the marker decal fees system.

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[4] Petitioners do not challenge the constitutionailty of Section 2101(b) *as amended*, which imposes a $5.00 marker fee, because the amount equals the stipulated cost of administering the marker decal system.

Respondents assert that since Act 1980-68 introduced the $25.00 marker decal fee *and* increased registration fees for the different weight classes of motor carrier vehicles by varying amounts, each of which exceeded the $25.00 marker fee amount, Section 2102(b) passes constitutional muster. The contemporaneous legislative history of Act 1980-68 and Respondents' consistent interpretation of the marker decal requirement as raising revenue solely from foreign-registered vehicles, however, belies this contention.

A review of the contemporaneous legislative history[5] of Act 1980-68 reveals that the Legislature did not increase registration fees so as to reflect the addition of the marker decal fee requirement. While Act 1980-68 increased motor carrier vehicle registration fees by amounts ranging from $45.00 to $228.00, those increases were not intended to include the $25.00 marker decal fee.

Senate Bill No. 10 (Printer's No. 965), the precursor of Act 1980-68, when first reported from the Transportation Committee on June 25, 1979, significantly raised registration fees without including a marker decal fee provision. When the $25.00 marker decal fee requirement was first introduced in Senate Bill No. 10 (Printer's No. 1834), as reported from Conference Committee on May 27, 1980, not only were the registration fees not increased to reflect the added marker decal fee requirement, but the registration fees for vehicles of two weight classes were actually decreased.[6] The Legislature, therefore, did not increase registration fees so as to require

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[5] Section 1921(c)(7) of the Statutory Construction Act, 1 Pa.C.S. § 1921(c)(7), permits resort to the contemporaneous legislative history of an act when, as here, the words of a statute are not explicit.

[6] The registration fees for vehicles weighing between 21,001-26,000 pounds and 68,001-73,280 pounds were decreased by $2.00 and $41.00 respectively. (*Compare* Senate Bill No. 10, Printer's Nos. 1834 and 1052.)

owners of Pennsylvania-registered vehicles to actually pay the marker decal fee.

Further, the Respondents have consistently interpreted Section 2102(b) as raising revenue *exclusively* from out-of-state carriers. By stipulation, marker decal fee revenues for the year beginning April 1, 1981, equalled $10,553,654.00. (Stipulation of Fact. No. 70,) This amount is roughly equivalent to the sum total of marker decal expenditures by Petitioners and their class for that period.

It is apparent from the contemporaneous legislative history that the Legislature intended to *exclusively* tax foreign-registered vehicles, and from the Stipulation of Facts that the Commonwealth has treated the marker decal tax receipts as coming *solely* from out-of-state carriers. Section 2102(b), therefore, facially discriminates in favor of local interests and against foreign-registered vehicles engaging in interstate commerce.

A state tax on interstate commerce does not offend the Commerce Clause of the United States Constitution, Art. 1, § 8, if that tax [1] is applied to an activity with a substantial nexus with the taxing state, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). Section 2102(b) facially fails the third prong of the *Complete Auto* standard which prohibits discrimination against interstate commerce. Notwithstanding legislative legerdemain in the insertion of the obfuscating term "deemed," Pennsylvania-registered vehicles were *exempted* from, and foreign-registered vehicles were *subject* to, the marker decal fee. "The commerce clause forbids discrimination, whether forthright or ingenious." *Best & Co. v. Maxwell*, 311 U.S. 454, 455, 61 S.Ct. 334, 335, 85 L.Ed. 275 (1940) (footnote omitted).

Since Section 2102(b) facially discriminates against foreign-registered vehicles and in favor of Pennsylvania-registered vehicles in violation of the Commerce Clause of the United States Constitution, Petitioners' additional arguments need not be addressed.

ORDER

AND NOW, this 17th day of October, 1983, it is hereby declared that the $25.00 identification marker fee imposed upon interstate motor carrier vehicles pursuant to Section 2102(b) of the Vehicle Code, 75 Pa.C.S. § 2102 (b), violates the Commerce Clause to the United States Constitution.

Refunds of payments for identification markers for the year beginning April 1, 1982, shall proceed in accordance with the Stipulation of the parties dated February 25, 1982.

APPENDIX G

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 11 M.D. Appeal Docket 1985

Appeal from Order of the
Commonwealth Court dated
February 5, 1985 entered
in No. 315 C.D. 1982.

AMERICAN TRUCKING ASSOCIATIONS, INC.
2200 Mill Road, Alexandria, VA 22314

OLD DOMINION FREIGHT LINE, INC.
P.O. Box 2006, High Point, NC 27261

and

ANDERSON TRUCKING SERVICE, INC.
203 Cooper Avenue North, Saint Cloud, MN 56301
Individually and on behalf of a class of
interstate motor carriers similarly situated,
Petitioners-Appellees

v.

JAMES I. SCHEINER, Secretary of the Department
of Revenue of the Commonwealth of Pennsylvania
11th Floor, Strawberry Square, Harrisburg, PA 17120

LEROY S. ZIMMERMAN, Attorney General of the
Commonwealth of Pennsylvania,
16th Floor, Strawberry Square, Harrisburg, PA 17120

and

NICHOLAS G. DELLARCIPESTE, Commissioner of the
State Police of the Commonwealth of Pennsylvania
1800 Elmerton Avenue, Harrisburg, PA 17109
Respondents-Appellants

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that each and all of the above-named Petitioners-Appellees hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the Commonwealth of Pennsylvania entered in this action on May 6, 1986, reversing the decision and order of the Commonwealth Court of Pennsylvania granting Petitioners-Appellees judgment against Respondents-Appellants.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ Daniel R. Barney
DANIEL R. BARNEY
ROBERT DIGGES, JR.
ATA LITIGATION CENTER
2200 Mill Road
Alexandria, VA 22314-4654
(703) 838-1865
Counsel for Petitioners-Appellees

Of Counsel:
William S. Busker
Vice President,
Legal Affairs
American Trucking
Associations, Inc.

Dated: June 13, 1986

cc: Commonwealth Court of Pennsylvania

APPENDIX H

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 12 M.D. Docket 1985

Appeal from Order of the
Commonwealth Court dated
February 5, 1985 entered
in No. 267 C.D. 1983.

AMERICAN TRUCKING ASSOCIATIONS, INC.
2200 Mill Road, Alexandria, VA 22314

TRI-STATE MOTOR TRANSIT COMPANY
P.O. Box 113, Joplin, MO 64802

INTERSTATE VAN LINES, INC.
5801 Rolling Road, West Springfield, VA 22152

INTERSTATE TRUCK LEASING, INC.
2700 Palmyra Road, Albany, GA 31707

and

ASTRO CONTAINER COMPANY,
A Division of Allied Drum Services, Inc.
P.O. Box 41046, Evendale, OH 45241

Individually and on behalf of a class of
interstate motor carriers similarly situated,
Petitioners-Appellees

v.

JAMES I. SCHEINER, Secretary of the Department
of Revenue of the Commonwealth of Pennsylvania
11th Floor, Strawberry Square, Harrisburg, PA 17120

LEROY S. ZIMMERMAN, Attorney General of the
Commonwealth of Pennsylvania,
16th Floor, Strawberry Square, Harrisburg, PA 17120
Respondents-Appellants

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that each and all of the above-named Petitioners-Appellees hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the Commonwealth of Pennsylvania entered in this action on May 6, 1986, reversing the decision and order of the Commonwealth Court of Pennsylvania granting Petitioners-Appellees judgment against Respondents-Appellants.

This appeals is taken pursuant to 28 U.S.C. § 1257(2).

/s/ Daniel R. Barney
DANIEL R. BARNEY
ROBERT DIGGES, JR.
ATA LITIGATION CENTER
2200 Mill Road
Alexandria, VA 22314-4654
(703) 838-1865
Counsel for Petitioners-Appellees

Of Counsel:
William S. Busker
Vice President,
Legal Affairs
American Trucking
Associations, Inc.

Dated: June 13, 1986

cc: Commonwealth Court of Pennsylvania

APPENDIX I

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 19 M.D. Appeal Docket 1985

Appeal from Order of the
Commonwealth Court dated
February 7, 1985 entered
in No. 160 C.D. 1984

AMERICAN TRUCKING ASSOCIATIONS, INC.
2200 Mill Road, Alexandria, VA 22314

OLD DOMINION FREIGHT LINE, INC.
P.O. Box 2006, High Point, NC 27261

and

ANDERSON TRUCKING SERVICE,
203 Cooper Avenue North, Saint Cloud, MN 56301

Individually and on behalf of a class of
interstate motor carriers similarly situated,
Respondents-Appellants

v.

JAMES I. SCHEINER, Secretary of the Department
of Revenue of the Commonwealth of Pennsylvania
11th Floor, Strawberry Square, Harrisburg, PA 17127

LEROY S. ZIMMERMAN, Attorney General of the
Commonwealth of Pennsylvania,
16th Floor, Strawberry Square, Harrisburg PA 17127

and

NICHOLAS G. DELLARCIPESTE, Commissioner of the
State Police of the Commonwealth of Pennsylvania
1800 Elmerton Avenue, Harrisburg, PA 17109
Respondents-Appellees

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that each and all of the above-named Petitioners-Appellees hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the Commonwealth of Pennsylvania entered in this action on May 6, 1986, affirming the decision and order of the Commonwealth Court of Pennsylvania dismissing the complaint of Petitioners-Appellants.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ Daniel R. Barney
DANIEL R. BARNEY
ROBERT DIGGES, JR.
ATA LITIGATION CENTER
2200 Mill Road
Alexandria, VA 22314-4654
(703) 838-1865
Counsel for Petitioners-Appellants

Of Counsel:
William S. Busker
Vice President,
Legal Affairs
American Trucking
Associations, Inc.

Dated: June 13, 1986

cc: Commonwealth Court of Pennsylvania

APPENDIX J

PA. CONS. STAT. ANN.

CHAPTER 21.—MOTOR CARRIERS ROAD TAX IDENTIFICATION MARKERS

* * * *

§ 2102. Identification markers required

(a) General rule.—The Secretary of Revenue shall provide an identification marker for every motor carrier vehicle.

(1) All motor vehicles required to display the identification marker shall permanently affix such identification marker on the top one-half of the outside door panel on the driver's left-hand side and shall follow the directions as indicated on the reverse side of the identification marker.

(2) The identification marker shall remain the property of the Commonwealth and may be recalled for any violation of the provisions of this chapter, the "Motor Carriers Road Tax Act" [1] or the regulations promulgated thereunder.

(b) Fee.—The fee for issuance of an identification marker prior to and including March 31, 1983 shall be $25 and thereafter the fee shall be $5. For vehicles registered in this Commonwealth, the vehicle identification marker fee shall be deemed a part of and included in the vehicle registration fee. Payment of the fee notwithstanding, no marker, permit or registration card shall be issued unless the tax imposed by section 9902 (relating to imposition of axle tax) has been paid.

(c) Issuance of markers.—Identification markers shall be issued on a 12-month basis, effective April 1 of each

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[1] 72 P.S. § 2617.1 et seq.

year, and shall be valid through the next succeeding March 31; however, enforcement of this section shall not become effective until April 15 of each year as to motor carrier vehicles displaying the previous year's identification marker.

(d) Operation without identification marker unlawful. —It shall be unlawful to operate or to cause to be operated in this Commonwealth any motor carrier vehicle unless the vehicle bears the identification marker required by this section.

(1) The Secretary of Revenue may by regulation exempt from the requirement to display the identification marker motor carrier vehicles which in his opinion are clearly identifiable such that effective enforcement of this chapter will not suffer thereby.

(2) For a period not exceeding five days as to any one motor carrier, the Secretary of Revenue by letter or telegram may authorize the operation of a motor carrier vehicle or vehicles without the identification marker required or the payment of the axle tax when the enforcement of this section or section 9902 for that period would cause undue delay and hardship in the operation of such motor carrier vehicle or vehicles:

(i) The fee for such permits shall be $25 for each motor carrier vehicle which shall be deposited in the Highway Bridge Improvement Restricted Account within the Motor License Fund.

(ii) Conditions for the issuance of such permits shall be set forth in regulations promulgated by the Department of Revenue.

1980, June 18, P.L. 229, No. 68, § 4, effective in 60 days. As amended 1982, June 23, P.L. 605, No. 171, § 8, imd. effective; 1982, Dec. 8, P.L. 842, No. 234, § 1, effective April 1, 1983.

CHAPTER 99.—AXLE TAX FOR HIGHWAY BRIDGE IMPROVEMENT

§ 9901. Definitions

The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Department." The Department of Revenue.

"Motor carrier." Every person who operates or causes to be operated any motor vehicle on any highway in this Commonwealth.

1982, Dec. 8, P.L. 842, No. 234, § 3, effective April 1, 1983.

§ 9902. Imposition of axle tax

In addition to any other tax imposed by law, all motor carriers shall pay an annual tax in the amount of $36 per axle on every truck, truck tractor or combination having a gross weight or registered gross weight in excess of 26,000 pounds operated on the highways of this Commonwealth.

1982, Dec. 8, P.L. 842, No. 234, § 3, effective April 1, 1983.

§ 9903. Report and payment of tax

The tax shall be paid to the department at the time a motor carrier applies for vehicle registration or for the issuance of an identification marker or permit pursuant to section 2102 (relating to identification markers required). No registration card or identification marker or permit shall be issued unless the tax imposed by section 9902 (relating to imposition of axle tax) has been paid.

1982, Dec. 8, P.L. 842, No. 234, § 3, effective April 1, 1983.

§ 9904. Axle tax markers required

(a) General rule.—The Secretary of Revenue shall provide axle tax markers for each truck, truck tractor or combination upon which axle tax has been paid pursuant to section 9902 (relating to imposition of axle tax). The marker must be affixed to the vehicle and displayed as prescribed by regulation prior to the operation of the vehicle in this Commonwealth.

(b) Issuance of markers.—The axle tax marker shall be issued for a 12-month period which coincides with the period of validity of either the identification marker or registration referred to in section 9903 (relating to report and payment of tax).

(c) Penalty.—Any person who operates or causes to be operated in this Commonwealth any vehicle not displaying the axle tax marker as required by this section commits a summary offense and shall, upon conviction, be sentenced, for a first offense, to pay a fine of not less than $200 nor more than $500 and, for each subsequent or additional offense, to pay a fine of not less than $300 nor more than $500 or to imprisonment for not more than 90 days, or both.

(d) Exception.—This section shall not apply to a person operating a vehicle under a valid permit issued pursuant to section 2102(d)(2) (relating to identification markers required).

1982, Dec. 8, P.L. 842, No. 234, § 3, effective April 1, 1983. As amended 1983, July 7, P.L. 32, No. 19, § 6, imd. effective.

§ 9905. Rebate in case of incidental travel

The full axle tax applies to vehicles which travel at least 2,000 miles annually in this Commonwealth. Vehicles travelling less than 2,000 miles annually may file with the department for an axle tax rebate which shall

be supported by such data as may be required by the department by regulation. The rebate will be calculated in accordance with the following formula:

$$\frac{\text{2,000—actual miles travelled}}{\text{2,000}} \text{ x axle tax paid} = \text{rebate}$$

1982, Dec. 8, P.L. 842, No. 234, § 3, effective April 1, 1983.

§ 9906. Penalties

In addition to any penalties which may be imposed for the failure to register a vehicle or obtain and display an identification marker or special permit, any person who willfully fails to pay the tax imposed by this chapter when due commits a summary offense and, upon conviction shall be sentenced, for a first offense, to pay a fine of not less than $100 nor more than $500 and, for each subsequent or additional offense, to pay a fine of not less than $200 nor more than $500 or to undergo imprisonment for a term not exceeding 90 days or both.

1982, Dec. 8, P.L. 842, No. 234, § 3, effective April 1, 1983.

§ 9907. Deposit of proceeds and purpose of tax

(a) General rule.—Proceeds from all taxes and penalties imposed by this chapter shall be deposited in the Highway Bridge Improvement Restricted Account within the Motor License Fund, which account is hereby created.

(b) Purpose of tax.—It is the declared policy of the Commonwealth that the money raised by the tax imposed by this chapter be used, to the greatest extent possible, to provide for the creation of jobs and the rehiring of the unemployed in this Commonwealth. In order to reach this goal, firms with Pennsylvania-based facilities shall be actively solicited to make bids on contracts to furnish

products and materials, including, but not limited to, steel and steel products, to be used in the projects funded through the Highway Bridge Improvement Restricted Account.

1982, Dec. 8, P.L. 842, No. 234, § 3, effective April 1, 1983.

§ 9908. Appropriation

The funds deposited in the Highway Bridge Improvement Restricted Account within the Motor License Fund are hereby annually appropriated out of the account upon authorization by the Governor, for expenditure on bridge rehabilitation, replacement and removal projects pursuant to the act of December 8, 1982 (P.L. 848, No. 235), known as the "Highway-Railroad and Highway Bridge Capital Budget Act for 1982-1983," in accordance with the following priorities:

(1) The first priority is to the Treasury Department for deposit into the Capital Debt Fund for the payment of debt service on general obligation bonds of the Commonwealth which may be issued from time to time to fund any project described in the "Highway-Railroad and Highway Bridge Capital Budget Act for 1982-1983."

(2) The second priority is to the Department of Transportation in the event excess funds are available after the annual debt service requirements have been satisfied for:

(i) The non-Federal share of bridge rehabilitation, replacement and removal projects on State-owned bridges and bridges of undetermined ownership on State highways.

(ii) Grants to counties or municipalities to fund up to 80% of the non-Federal share of bridge rehabilitation, replacement and removal

projects on county-owned or municipal-owned bridges, and bridges of undetermined ownership on county or municipal highways. The balance of the costs of these bridge projects shall be funded by the respective county or municipality or by private funds.

1982, Dec. 8, P.L. 842, No. 234, § 3, effective April 1, 1983.

§ 9909. Administration and enforcement

(a) General rule.—The Departments of Revenue and Transportation shall jointly promulgate any regulations necessary for the proper administration and enforcement of this chapter.

(b) Appeal procedures.—The procedures for appeals relating to the tax imposed by this chapter shall be consistent with those contained in Chapter 95 (relating to oil company franchise tax for highway maintenance and construction).

1982, Dec. 8, P.L. 842, No. 234, § 3, effective April 1, 1983.

* * * * *

SUBCHAPTER B. REGISTRATION FEES

§ 1916. Trucks and truck tractors

(a) General rule.—The annual fee for registration of a truck or truck tractor shall be determined by its registered gross weight or combination weight in pounds according to the following table:

Class	Registered Gross or Combination Weight in Pounds	Fee
1	5,000 or less	$ 39
2	5,001-7,000	54
3	7,001-9,000	102

4	9,001-11,000	132
5	11,001-14,000	162
6	14,001-17,000	192
7	17,001-21,000	237
8	21,001-26,000	270
9	26,001-30,000	243
10	30,001-33,000	306
11	33,001-36,000	342
12	36,001-40,000	366
13	40,001-44,000	357
14	44,001-48,000	393
15	48,001-52,000	444
16	52,001-56,000	480
17	56,001-60,000	558
18	60,001-64,000	597
19	64,001-68,000	633
20	68,001-73,280	690
21	73,281-76,000	885
22	76,001-78,000	909
23	78,001-78,500	921
24	78,501-79,000	933
25	79,001-80,000	945

* * * * *

As amended 1980, Feb. 15, P.L. 12, No. 8, § 1, imd. effective; 1980, June 11, P.L. 229, No. 68, § 2, effective in 60 days; 1982, Dec. 8, P.L. 842, No. 234, § 1, effective April 1, 1983.

* * * * *

1982 Amendment: Changed fees for Class 9 through Class 25 trucks and truck tractors.

SUBCHAPTER C

RECIPROCITY

Sec.

6141. Declaration of policy.

6142. Reciprocity agreements, arrangements and declarations authorized.

6143. Benefits, privileges and exemptions from taxes and fees.

6144. Vehicle registration and licensing.

6145. Proportional registration of fleet vehicles.

6146. Enforcement agreements.

6147. Declaration of reciprocity in absence of agreement.

6148. Applicability to leased vehicles.

6149. Automatic reciprocity.

6150. Proportional registration not exclusive.

6151. Suspension of reciprocity benefits.

6152. Form, publication and distribution of documents.

6153. Existing reciprocity agreements unaffected.

§ 6141. Declaration of policy

It is the policy of this Commonwealth to promote and encourage the fullest possible use of its highway system by authorizing the making and execution of reciprocal agreements, arrangments and declarations with other states, provinces, territories and countries with respect to drivers, licensed and vehicles registered in this and other states, provinces, territories and countries, thus

contributing to the economic and social development and growth of this Commonwealth.

1976, June 17, P.L. 162, No. 81, § 1, eff. July 1, 1977.

§ 6142. Reciprocity agreements, arrangements and declarations authorized

The secretary may execute or make agreements, arrangements and declarations to carry out the provisions of this subchapter and may amend and terminate the agreements, arrangements and declarations.

1976, June 17, P.L. 162, No. 81, § 1, eff. July 1, 1977.

§ 6143. Benefits, privileges and exemptions from taxes and fees

The secretary may enter into an agreement or arrangement with the duly authorized representatives of other jurisdictions, granting to drivers or vehicles or owners of vehicles properly licensed or registered in those jurisdictions, and for which evidence of compliance is supplied, benefits, privileges and exemptions from the payment, wholly or partially, of any taxes, fees or other charges imposed upon the drivers, vehicles or owners with respect to the operation or ownership of the vehicles under the laws of this Commonwealth. The agreement or arrangement shall provide that drivers or vehicles properly licensed or registered in this Commonwealth, when operating upon highways of the other jurisdiction, shall receive exemptions, benefits and privileges of a similar kind or to a similar degree as are extended to drivers or vehicles properly licensed or registered in the jurisdiction when operating in this Commonwealth. Each agreement or arrangement shall, in the judgment of the secretary, be in the best interest of this Commonwealth and the citizens thereof and shall be fair and equitable to this Commonwealth and the citizens thereof, and shall be determined on the basis and recognition of the benefits

which accrue to the economy of this Commonwealth from the uninterrupted flow of commerce.

1976, June 17, P.L. 162, No. 81, § 1, eff. July 1, 1977.

§ 6144. Vehicle registration and licensing

An agreement or arrangement entered into, or a declaration issued, under this subchapter may contain provisions authorizing the registration or licensing in another jurisdiction of vehicles located in or operated from a base in the other jurisdiction which vehicles otherwise would be required to be registered or licensed in this Commonwealth. In such event, the exemptions, benefits and privileges extended by the agreement or declaration shall apply to the vehicles when properly licensed or registered in the base jurisdiction.

1976, June 17, P.L. 162, No. 81, § 1, eff. July 1, 1977.

* * * *

§ 6147. Declaration of reciprocity in absence of agreement

In the absence of an agreement or arrangement with another jurisdiction, the secretary may examine the laws and requirements of such jurisdiction and declare the extent and nature of exemptions, benefits and privileges to be extended to vehicles properly registered or licensed in the other jurisdiction, or to the owners of the vehicles, which shall, in the judgment of the secretary, be in the best interest of this Commonwealth and the citizens thereof, and which shall be fair and equitable to this Commonwealth and the citizens thereof, and shall be determined on the basis and recognition of the benefits which accrue to the economy of this Commonwealth from the uninterrupted flow of commerce.

1976, June 17, P.L. 162, No. 81, § 1, eff. July 1, 1977.

* * * *

§ 6149. Automatic reciprocity

If no agreement, arrangement or declaration is in effect with respect to another jurisdiction as authorized by this subchapter, any vehicle properly registered or licensed in the other jurisdiction, and for which evidence of compliance is supplied, shall receive, when operated in this Commonwealth, the same exemptions, benefits and privileges granted by the other jurisdiction to vehicles properly registered in this Commonwealth.

1976, June 17, P.L. 162, No. 81, § 1, eff. July 1, 1977.

APPENDIX K

DISCRIMINATORY STATE HIGHWAY USE TAXES

STATE	STATUTORY AUTHORIZATION	DESCRIPTION	LITIGATION
1. Arkansas	1. A. Ark. Stat. Ann. § 73-1779 (Repl. 1979) B. Ark. Stat. Ann. §§ 75-817.2, 75-817.3 (a) (3), (4), and (5) (Supp. 1985)	1. A. Retaliatory charge levied in response to Interstate Commerce Commission Authority registration fees B. Heavy vehicle use tax imposed on trucks with gvw over 73,280 pounds at $175 annually or 5¢ per mile	1. A. None B. *American Trucking Associations, Inc. ("ATA") v. Gray*, 707 S.W.2d 759 (Ark. 1986) (appeal pending) (tax found constitutional under *Aero-Mayflower* line of cases)
2. Connecticut	2. Conn. Gen. Stat. Ann. § 12-487 (West 1983)	2. $40 fuel tax decal	2. *ATA v. O'Neill*, 522 F.Supp. 49 D. Conn. 1981) (following issuance of preliminary injunction enjoining enforcement of tax, state legislature lowered fee to $10)
3. Delaware	3. Del. Code Ann. tit. 21, § 402 (1985)	3. Retaliatory tax—not currently in effect	3. None
4. Florida	4. Fla. Stat. Ann. § 207.004 (5) (d) (West Supp. 1986)	4. Retaliatory tax—imposed in response to *inter alia* Arkansas HUE tax and Pennsylvania axle tax	4. *Private Truck Council of America, Inc. ("PTCA") v. Florida Dept. of Revenue*, No. 85-368 (Fla. Cir. Ct., Leon Cty.)
5. Georgia	5. Ga. Code Ann. § 40-2-111 (1985)	5. Retaliatory tax—imposed in response to *inter alia* Arkansas HUE tax and Pennsylvania axle tax	5. *PTCA v. Georgia*, No. D15385 (Ga. Super. Ct., Fulton Cty.)
6. Illinois	6. Ill. Ann. Stat. ch. 95½, § 18-801 (Smith-Hurd 1971)	6. Retaliatory tax—not currently in effect	6. None
7. Indiana	7. A. Ind. Code Ann. § 9-7-8-1 (Burns 1980) B. Ind. Code Ann. § 6-6-8 (Burns Supp. 1986) C. Ind. Code Ann. §§ 6-1.1-8-2 and 6-1.1-8-12.5 (Burns 1984)	7. A. Retaliatory tax—not currently in effect B. $50 per truck flat highway use tax C. Indefinite-situs property tax	7. A. None B. None C. *Huie v. PTCA*, 466 N.E.2d 435 (Ind. 1984) (tax found to discriminate against interstate commerce)
8. Iowa	8. Iowa Code Ann. § 326.32 (West 1985)	8. Retaliatory tax	8. None
9. Kansas	9. Kan. Stat. Ann. § 74-4302 (1985)	9. Retaliatory tax	9. None
10. Kentucky	10. Ky. Rev. Stat. Ann. § 138.660(4)-(7) (Baldwin Supp. 1986)	10. $150 to $200 per truck highway use tax	10. *ATA v. Kentucky*, No. 86-CI-0464 (Ky. Cir. Ct., Franklin Cty.)
11. Louisiana	11. A. La. Rev. Stat. Ann. § 47:511 (West 1970) B. La. Rev. Stat. Ann. § 45:163.1 (West Supp. 1986)	11. A. Retaliatory tax—not currently in effect B. Public Service Commission registration tax	11. A. None B. *PTCA v. Louisiana*, No. 289, 481 [2 La.] St. Tax Rep. (CCH) T 800-890 (La. D. Ct. 19th J.D., DIVH, June 20, 1986) (tax found to discriminate against interstate commerce)
12. Maine	12. A. Me. Rev. Stat. Ann. tit. 29, § 246-A (Supp. 1981) B. Me. Rev. Stat. Ann. tit. 29, § 2243 (Supp. 1985)	12. A. $40 fuel tax decal B. Retaliatory tax—imposed *inter alia* in response to Arkansas HUE tax and Pennsylvania axle tax	12. A. *ATA v. Quinn*, 437 A.2d 623 (Me. 1981) (tax found to discriminate against interstate commerce) B. *PTCA v. Secretary of State*, 503 A.2d 214 (Me.), *cert. denied*, 106 S. Ct. 1997 (1986) (tax found to discriminate against interstate commerce)
13. Maryland	13. Md. Transp. Code Ann. § 13-423(a) (1984)	13. $25 fuel tax decal	13. *ATA v. Goldstein*, 483 A.2d 47 (Md. 1984) (tax found constitutional under *Aero-Mayflower* line of cases)
14. Michigan	14. Mich. Stat. Ann. § 9.1745 (Callaghan 1981)	14. Retaliatory tax—not currently in effect	14. None
15. Minnesota	15. Minn. Stat. § 168.187 Sub. 7 (1980)	15. Retaliatory tax—imposed on trucks registered in New York and Ohio	15. None
16. Nebraska	16. Neb. Rev. Stat. § 60-305.03 (1984)	16. Retaliatory tax—imposed *inter alia* in response to Arkansas HUE tax and Pennsylvania axle tax	16. *PTCA v. Nebraska*, No. 841 (Neb. D. Ct., Lancaster Cty.)
17. New Hampshire	17. N.H. Rev. Stat. Ann. § 260:53 (1982) (repealed by Laws 1985, 383.2, effective July 1, 1985) (Supp. 1985)	17. Retaliatory tax—imposed *inter alia* in response to Pennsylvania axle tax	17. *PTCA v. New Hampshire*, No. 86-088 (Aug. 12, 1986) (tax found to discriminate against interstate commerce)
18. New Jersey	18. A. N.J. Stat. Ann. § 39:3-6 (West 1973) B. N.J. Stat. Ann. § 54:39A-10 (West Supp. 1986) C. N.J. Stat. Ann. § 48:4-2) (West Supp. 1986)	18. A. Retaliatory tax—imposed *inter alia* in response to Pennsylvania axle tax B. $25 fuel tax decal C. Bus excise tax	18. A. *PTCA v. New Jersey*, No. L875-1261 (N.J. Super. Ct., Mercer Cty., Oct. 4, 1985) (appeal pending) (tax found constitutionally permissible) B. *ATA v. Kline*, No. 07-14-1667-85 MVT (N.J. Tax Ct.) C. *Continental Trailways, Inc. v. Director, Div. of Motor Vehicles*, 509 A.2d 769 (N.J. 1986) (tax found to discriminate against interstate commerce)
19. North Carolina	19. N.C. Gen. Stat. § 20-4.4(b) (1983)	19. Retaliatory tax	19. None
20. Oklahoma	20. Okla. Stat. Ann. tit. 47, § 1120 (West Supp. 1985)	20. Retaliatory tax imposed *inter alia* in response to Arkansas HUE tax and Pennsylvania axle tax	20. *PTCA v. Oklahoma*, No. CH-84-9902 (Okla. D. Ct., Oklahoma Cty.)
21. Pennsylvania	21. A. Pa. Cons. Stat. Ann. tit. 75, § 2102 (Purdon 1981) B. Pa. Cons. Stat. Ann. tit. 75, § 9901 (Purdon Supp. 1986)	21. A. $25 fuel tax decal B. $36 per axle tax	21. A. *ATA v. Scheiner*, 509 A.2d 838 (Pa. 1986) (appeal pending) (tax found constitutional under *Aero-Mayflower* line of cases) B. *ATA v. Scheiner*, 509 A.2d 838 (Pa. 1986) (appeal pending) (tax found constitutional under compensatory tax doctrine and *Aero-Mayflower* line of cases)
22. Rhode Island	22. R.I. Gen. Laws § 31-36.1-19 (1982)	22. Retaliatory tax—not currently in effect	22. None
23. Tennessee	23. Tenn. Code Ann. § 55-4-120 (1980)	23. Retaliatory tax—not currently in effect	23. None
24. Vermont	24. A. Vt. Stat. Ann. tit. 23, §§ 415, 415(a), 417 (Supp. 1982) B. Vt. Stat. Ann. tit. 23, §§ 415, 3007, 3010 (Supp. 1982) C. Vt. Stat. Ann. tit. 23, § 417 (Supp. 1982) D. Vt. Stat. Ann. tit. 23, §§ 415, 3007 (Supp. 1986) E. Vt. Stat. Ann. tit. 23, § 3021 (Supp. 1985)	24. A. Entry fee tax system B. $50 fuel tax decal C. Retaliatory tax—imposed in response to weight distance taxes D. $50 fuel tax decal E. Retaliatory tax imposed in response to Pennsylvania axle tax	24. A. *ATA v. Conway*, 508 A.2d 405 (Vt. 1986) (tax found to discriminate against interstate commerce) B. *ATA v. Conway*, 508 A.2d 408 (Vt. 1986) (tax found to discriminate against interstate commerce) C. *ATA v. Conway*, No. S-95-86 WnC (Vt. Super. Ct. Washington Cty.) D. *ATA v. Conway*, No. S-147-86 WnC, [Vt.] St. Tax Rep. (CCH) T 200-263 (Vt. Super. Ct. Washington Cty., May 29, 1986) E. None
25. Virginia	25. Va. Code § 46.1-35 (Supp. 1985)	25. Retaliatory tax—not currently in effect	25. None
26. Wisconsin	26. Wis. Stat. § 341.41(3) (1982)	26. Retaliatory tax—imposed in response to weight distance taxes	26. None

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No. 86-357

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,
Appellants

v.

JAMES I. SCHEINER, SECRETARY OF THE DEPARTMENT OF REVENUE, et, al.,
Appellees

On Appeal from the Supreme Court of Pennsylvania

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether a state may, consistent with the Commerce Clause, amend its tax laws to redistribute the tax burden between interstate and intrastate commerce in such a way as to increase the relative burden on interstate commerce when the resulting tax distribution still weighs more heavily on intrastate commerce than interstate commerce.

2. Whether this Court should overrule the principle, reaffirmed as recently as 1978, that states may impose reasonable flat taxes on interstate commerce.

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On Appeal from the Supreme Court
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MOTION TO DISMISS OR AFFIRM

STATEMENT OF THE CASE

In this appeal, appellants, who are interstate motor carriers registered outside of Pennsylvania, challenge two Pennsylvania taxes imposed on trucks, tractor-trailers and combinations which travel in Pennsylvania. Both of those taxes were declared unconstitutional by the trial court, but both were upheld by the Pennsylvania Supreme Court. This appeal followed.

1. The Marker Fee.

From April 1, 1981 through April 1, 1983, Pennsylvania imposed a $25 "Marker Fee" as a charge[1] for obtaining a road tax identification

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[1] This tax was reduced from $25 to $5 by the same legislation, Act 234 of 1982, which created the Axle Tax. J.S. App. 7a.

marker, a decal which out-of-state trucks are required to display in order to identify themselves as being subject to another tax -- the Motor Carriers Road Tax. 75 Pa. Cons. Stat. § 2101, J.S. App. 80a-81a. Trucks registered in Pennsylvania also are subject to the Motor Carriers Road Tax, but need not display the marker decal because their Pennsylvania license plate serves the same purpose. Ibid. For Pennsylvania trucks, the Marker Fee is deemed part of and included in the substantial fee which their owners pay to register in Pennsylvania. When the $25 Marker Fee was first imposed on out-of-state trucks, the registration fees for instate trucks was also raised by substantially more than $25. J.S. App. 7a.

The trial court held that, as a matter of law, the $25 Marker Fee was imposed only on trucks not registered in Pennsylvania, and that the fee therefore discriminated on its face against interstate commerce in violation of the Commerce Clause. J.S. App. 57a. It did not reach the claim that the Marker Fee also was unconstitutional because it was a flat tax not adequately related to the services provided by the Commonwealth.

The Supreme Court of Pennsylvania disagreed and reversed. First, the state Supreme Court found that the trial court had misread Pennsylvania law in determining that the $25 Marker Fee was not included in the registration fees paid by Pennsylvania-registered trucks. J.S. App. 23a. It also found

that, when viewed as a whole, Pennsylvania's tax scheme imposes substantially higher taxes on Pennsylvania-registered vehicles than on those registered elsewhere, and that there was therefore no discrimination against interstate commerce. J.S. App. 24a.

The court then reached and rejected the argument that the $25 fee was not fairly related to the services provided by Pennsylvania. In so doing, it relied on a long line of this Court's decisions upholding flat taxes on interstate commerce and holding that such taxes need not be calibrated exactly to services received by individual users of state facilities, so long as they are not excessive in the aggregate. Applying those principles, the state court held that the Marker Fee tax did not

impose an excessive burden on interstate commerce in light of the substantial highway construction and maintenance, state police services and construction bond debt services which it financed, all of which benefited interstate commerce. J.S. App. 29a.

Here, appellants do not challenge the state court's holding that the $25 Marker Fee was imposed on both interstate and intrastate commerce. They do challenge that court's conclusion that the tax was reasonably related to services provided by Pennsylvania.

2. The Axle Tax.

The Axle Tax is an annual tax of $36 per axle imposed by Pennsylvania on every truck, tractor-trailer and combination which travels in Pennsylvania and has a gross weight in excess of

26,000 pounds. 75 Pa. Cons. Stat. § 9901 et seq., J.S. App. 82a-86a. Refunds are available based on actual mileage traveled for any covered vehicle traveling less than 2,000 miles in Pennsylvania. 75 Pa. Cons. Stat.§ 9905, J.S. App. 83a. Proceeds from the tax are placed in a special account dedicated to bridge rehabilitation and replacement projects. 75 Pa. Cons. Stat. § 9908, J.S. App. 85a.

Act 234 of 1982, the same act which imposed the Axle Tax on all trucks, also lowered registration fees for trucks registered in Pennsylvania, 75 Pa. Cons. Stat. § 9916, J.S. App. 86a-87a, and reduced from $25 to $5 the Marker Fee imposed on out-of-state trucks, J.S. App. 7a. The effect of the lowered registration fee was to offset

approximately the effect of the Axle Tax for most trucks registered in Pennsylvania. However, taken in combination with an increase in the registration fee which had occurred in 1980 (at the same time the $25 marker fee was imposed) the net effect was still an increase for most trucks registered in Pennsylvania.[2]

The state trial court entered summary judgment for the motor carriers

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[2] For example, in 1980, the registration fee for a motor carrier vehicle with a gross or combination weight of 68,001-73,280 pounds increased $228.00. J.S. App. 7a. The 1982 decrease in the registration fee was only $144.00. J.S. App. 9a. Thus, the total registration fee for such vehicles increased $84.00 after 1980. In addition, after 1982, Pennsylvania registered vehicles also paid the Axle Tax -- generally $144.00 (4 Axles x $36) for vehicles in that weight class.

declaring the Axle Tax unconstitutional. The court held that the Axle Tax facially discriminated against interstate commerce because the simultaneous registration fee reductions almost always offset the Axle Tax, virtually exempting Pennsylvania trucks from the Axle Tax. J.S. App. 61a.

The Supreme Court of Pennsylvania reversed, upholding the Axle Tax. It found no discrimination against interstate commerce because, when Pennsylvania's tax scheme was viewed as a whole, intrastate commerce paid substantially higher taxes to Pennsylvania. J.S. App. 33a-34a. The Court also rejected the claim that the Axle Tax is excessive or is not fairly related to the services provided by the Commonwealth. J.S. App. 34a.

THIS CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

Appellants purport to raise two substantial federal questions. First, they claim that the Commerce Clause never permits a state to change its tax structure to increase the relative tax burden on interstate commerce, regardless of the inequities of the old tax structure and regardless of whether the new tax structure weighs too heavily on interstate commerce. Second, they contend that flat taxes invariably discriminate against interstate commerce, because a flat tax imposes a substantially higher tax per mile travelled on trucks registered outside the state than on trucks registered in the state. In fact, neither question is substantial; they have been settled by prior decisions of the Court and do not require its further attention.

1. A State May Redistribute The Tax Burden Between Interstate and Intrastate Commerce In Such A Way As To Increase The Burden On Interstate Commerce.

a. Appellants' first claim is that a state may never redistribute the tax burden between interstate and intrastate commerce.[3] Starting with the principle that charges which apply only to interstate commerce are facially discriminatory and therefore unconstitutional, the appellants conclude that a "manipulation" of the taxing scheme which results in a relative increase in taxes paid by out-of-state users of state facilities is itself facial discrimination. J.S. at 18-19. What this amounts to is that, having once

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[3]This claim relates only to the Axle Tax.

chosen a tax structure and distribution which meets the standards summarized in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), a state is frozen into that scheme forever. This cannot be the case. Complete Auto and this Court's other Commerce Clause decisions allow states greater latitude than that.

This Court has never held that there is only one acceptable distribution of tax burdens between interstate and intrastate commerce. It has only held that, taken as a whole, a state's taxing scheme should not discriminate against interstate commerce by providing intrastate commerce with a competitive advantage, but that interstate commerce may unquestionably be required to "pay its own way." Maryland v. Louisiana, 451 U.S. 725, 754 (1981).

In their first claim, appellants concentrate on the principle that state laws may not discriminate against interstate commerce. Their argument, however, proves too much. What it ignores is that discrimination is a question of the relative burdens imposed on in-state and out-of-state competitors, not an inquiry confined solely to any incremental alteration of an existing tax scheme. See Maryland v. Louisiana, 451 U.S. at 756. The state Supreme Court recognized this principle and applied it properly to the facts of this case. See J.S. App. 31a-35a.

The Axle Tax does not stand alone -- it is but a small part of Pennsylvania's multi-tiered scheme of taxes and fees designed to finance an

extensive highway system. See J.S. App. 2a-3a. In line with the holding in Maryland v. Louisiana, one which appellants do not question, the entire taxing scheme must be examined. Of course, appellants have made no attempt, either here or in the courts below, to demonstrate that, in the aggregate, out-of-state truckers pay more than their fair share.

Quite aside from its conflict with recent precedent, appellants' position defies logic. Can it really be true that a state, having chosen initially to place the entire burden, or a disproportionately heavy burden, of taxation on local commerce, never may adjust its scheme to take better account of the benefits received by interstate commerce? This claim is insubstantial and does not deserve this Court's attention.

b. There is not, as appellants suggest, a conflict among decisions of state high Courts sufficient to justify the Court's review. Private Truck Council of America, Inc. v. New Hampshire, No. 86-088 (August 12, 1986) and American Trucking Associations, Inc. v. Quinn, 437 A.2d 623 (Maine 1981), involved taxes imposed solely on out-of-state carriers. Here, of course, the Axle Tax applies to all vehicles. In American Trucking Associations, Inc. v. Conway, 508 A.2d 408 (Vermont 1986), the court rejected the specific argument that imposition of a flat tax and simultaneous registration fee reductions were constitutional under the complementary tax doctrine. We argue that Pennsylvania's Axle Tax and registration fees

are not complementary and this is precisely why appellants' claim must be rejected. Again, the question is whether, considering all charges, taxes and fees, the burden imposed on interstate commerce is excessive. Maryland v. Louisiana, supra. While the Vermont court may have been correct in its application of the complementary tax doctrine to the specific defense raised by the state in that case, the decision is not in conflict with reasoning employed in this case.[4]

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[4] Appellants' discussion (J.S. 21-23) of the purpose underlying Pennsylvania's vehicle registration fees and the complementary tax doctrine are difficult to understand and, in any case, irrelevant. Appellees do not contend that the Axle Tax is a compensatory tax within the meaning of this Court's holdings. The lower court's erroneous reference to that doctrine was not essential to its holding and does not

(FOOTNOTE CONTINUED ON NEXT PAGE)

2. This Court Should Not Reconsider Or Overrule Its Prior Holdings that Flat Taxes May Be Imposed On Interstate Commerce So Long As They Are Not Excessive.

Appellants' primary contention is that the Marker Fee and Axle Tax both violate the fourth prong of the Complete Auto Test -- requiring a "fair relation" between the tax collected and the services provided -- because they are flat taxes, rather than per mile charges. Far from presenting a substantial question, this argument has been rejected

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(FOOTNOTE CONTINUED)

require review by this Court. Nor is legislative intent relevant. The issue is one of effect not intent. Appellees do not, and could not, argue that good intent would save a tax scheme which in fact discriminated against interstate commerce.

by this Court in an unbroken series of decisions stretching back more than fifty years. There is no reason for this Court to reconsider, let alone overrule, that line of cases.

In Aero Mayflower Transit Co. v. Georgia Public Service Commission, 295 U.S. 285 (1935)("Aero Mayflower I"), this Court upheld a flat $25 annual registration and license fee, used to support highway maintenance, imposed upon carriers using Georgia highways. In so doing, the Court observed:

> The [flat] fee is for the privilege of a use as extensive as the carrier wills that it shall be. There is nothing unreasonable or oppressive in a burden so imposed. One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may.

Id. at 289. (citations omitted). The Court reaffirmed this principle in Aero Mayflower Transit Co. v. Board of Railroad Commissioners of Montana, 332 U.S. 495 (1947)("Aero Mayflower II") while sustaining a $15 flat tax imposed as a highway user charge.

In 1950, this Court again reaffirmed the principle that flat taxes are permissible, holding that

> complete fairness would require that a tax formula vary with every factor affecting appropriate compensation for road use. These factors . . . are so countless that we must be content with rough approximation rather than precision. Each additional factor adds to administrative burdens . . . [which we recognize] may be sufficient to justify states in ignoring such a key factor as mileage.

Capitol Greyhound Lines v. Brice, 339 U.S. 542, 546-47 (1950). Likewise, in Evansville Airport v. Delta Airlines, 405 U.S. 707 (1972), this Court again upheld a flat tax on interstate commerce. That case involved a $1 fee imposed on each passenger boarding any commercial aircraft at Evansville Airport. In upholding the fee, the court stated:

> [A] state may impose a flat fee for the privilege of using its roads, without regard to the actual use by particular vehicles, so long as the fee is not excessive.

Id. at 715. In so holding, the Court cited, inter alia, Aero Mayflower I and II, supra, and Capitol Greyhound, supra. Finally, just one year after the decision in Complete Auto, the Court explicitly reaffirmed its Evansville holding in

Massachusetts v. United States, 435 U.S. 444 (1978)(involving a "flat fee" registration tax on aircraft).

Appellants offer several reasons why this Court should overrule this line of authority. These arguments merit only brief response. First, appellants claim that modern technology renders mileage-related taxes a workable alternative to flat taxes, undermining the reasoning of the cases upholding flat taxes. This is simply not correct. Presently, only a small percentage of vehicles are required to report their mileage for the purposes of Pennsylvania taxes. By contrast, New York state, which imposes a mileage-based tax on most motor carrier vehicles, employs over 100 individuals to perform various

auditing and processing tasks in connection with that tax.[5] Thus, it would be no inconsequential task for the Commonwealth to convert all of its user charges to a per mile basis.

As this Court has observed, when a user fee is precisely calibrated to reflect actual costs, administrative expenses increase and so does the amount of revenue needed to operate the system. The resulting increase in the amount which the state may properly charge the user (in compensation for added administrative costs) may well exceed any "overcharges" to individual users which

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[5] This information is set forth in the affidavit of Joseph Reohr, Jr., an official in the New York State Department of Taxation and Finance. That affidavit was filed in support of the Commonwealth's motion for summary judgment in the Axle Tax litigation.

could occur under a flat fee approach. Massachusetts v. United States, 435 U.S. at 466.

Second, appellants contend that the Marker Fee and Axle Tax impose an excessive burden on interstate commerce because out-of-state trucks pay a much higher per mile tax than do Pennsylvania registered trucks.[6] However, this Court has never held that a difference

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[6] In support of this proposition, they cite a survey admitted into evidence in the Marker Fee litigation, but never offered or admitted in the Axle Tax case. While admitted in the Marker Fee litigation, it was not relied on by the trial court in support of its holding, and its admissibility was vigorously contested. The issue of its admissibility was never decided by the Supreme Court on appeal. In fact, the survey was blatant hearsay, consisting only of a telephone survey conducted by one of appellants' employees. In any case, as is demonstrated above, the survey is irrelevant to the issues presented by this case.

in treatment between interstate and intrastate commerce is per se unconstitutional. Nor should it. Rather, the issue is whether the tax imposed on interstate commerce is excessive in relation to the services provided. The relative burdens on interstate versus intrastate commerce are not determinative on that issue. To the contrary, as the Pennsylvania Supreme Court correctly found, neither the Marker Fee nor the Axle Tax imposed an excessive burden on interstate commerce in comparison to the services rendered by Pennsylvania to that commerce.

Third, appellants argue that flat taxes will impose an adverse cumulative burden on interstate commerce. This argument too is irrelevant. If the burden imposed is not

excessive in light of the services rendered by the taxing state, the burden is not excessive for constitutional purposes. If a motor carrier operates in a number of states and receives substantial benefits in each of them, there is nothing unconstitutional about its being required to pay reasonable taxes in each of those states. Such a burden is wholly consistent with the well-established proposition that interstate commerce may be required to "pay its own way."

Finally, appellants note that the flat taxes have provoked economic retaliation among the states. Retaliatory taxes may indeed be unconstitutional under the Commerce Clause.[7]

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[7]Pennsylvania so argued before this Court as amicus in support of Arkansas' challenge to Oklahoma's retaliatory taxes. Arkansas v. Oklahoma, No. 79 Orig. (O.T. 1984).

However, the question of retaliatory taxes bears no relationship to the legality of the original tax. Is an otherwise legal tax rendered unconstitutional because another state copies the idea? Moreover, the question of retaliation has nothing to do with the questions raised by appellants--retaliation is not limited to flat taxes or adjustments to state taxing schemes. Thus, the potential illegality of retaliatory taxes provides no support to an attack on flat taxes alone. Rather, this argument, like the others appellants make, exposes their real concern -- that they will, in fact, be required to pay their fair share. That they may be required to do so is well established and requires no further action by this Court.

CONCLUSION

The appeal should be dismissed or the decision below should be affirmed.

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Supreme Court, U.S.
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No. 86-357

In the Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellants

v.

JAMES I. SCHEINER, SECRETARY OF THE DEPARTMENT OF REVENUE, *et al.*,
Appellees

On Appeal from the Supreme Court of Pennsylvania

REPLY BRIEF FOR THE APPELLANTS

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OCTOBER TERM, 1986

No. 86-357

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellants

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JAMES I. SCHEINER, SECRETARY OF THE DEPARTMENT OF REVENUE, *et al.*,
Appellees

On Appeal from the Supreme Court of Pennsylvania

REPLY BRIEF FOR THE APPELLANTS

The appeal in this case raises two significant issues concerning the power of a state to impose highway use taxes on interstate motor carriers: first, whether Pennsylvania has violated the Commerce Clause by structuring its axle tax so that the entire incidence of the tax falls on vehicles registered outside the State; second, whether Pennsylvania's marker fee and axle tax are impermissibly discriminatory because their economic effect is to impose a significantly higher per-mile tax cost on trucks registered outside Pennsylvania than on those registered in the State.[1]

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[1] In the Statement of Parties to the Proceeding (J.S. ii), we inadvertently omitted Anderson Trucking Services, Inc., an independ-

Appellees do not deny that these issues are of substantial practical importance both to the states and to the motor carrier industry. Nor do they seriously dispute the factual premises on which this appeal rests—that the burden of the axle tax has fallen exclusively on operators of vehicles registered outside Pennsylvania, and that the nature of the axle tax and marker fee is such that costs per mile decrease with increased use of the State's highways, generally advantaging locally-based vehicles over those registered elsewhere. Instead, they ask the Court to accept their vague and generalized assurances that the axle tax was a fair reallocation of tax burdens, while suggesting that, at least in the area of highway taxes, older decisions of this Court treat highway taxes as a unique exception to the Commerce Clause ban on discrimination.

We submit that appellees' arguments, which are remarkable for their failure to address the specifics of the contentions advanced in the Jurisdictional Statement, wholly fail to refute the need for plenary review by this Court.

1. ***Structural Discrimination.***

Appellants have advanced a straightforward analysis, rooted in the precedents of this Court, in support of the contention that Pennsylvania's axle tax embodies an impermissible structural discrimination against interstate commerce: (a) The states are in general not permitted to impose taxes solely upon interstate commerce or out-of-state businesses; (b) in determining the incidence of a challenged tax, the courts look beyond the face of the specific statute to the overall taxing scheme, so that a facially neutral tax may nevertheless be invali-

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ent corporation whose subsidiaries and affiliates (other than wholly-owned subsidiaries) are St. Cloud Truck Sales, K & W Trucking Co., Inc., H.E. Anderson Equipment Leasing, and R.B.J. Industries, Inc.

dated if changes to other provisions of the state's tax laws cause the tax to be imposed exclusively or disproportionately on out-of-state entities; and (c) some taxes exacted solely from interstate commerce may survive Commerce Clause scrutiny if complementary to other taxes imposed only on in-state businesses; but (d) this defense is available to the state only upon a precise showing of equivalence between the challenged tax and the tax for which it is said to compensate, which Pennsylvania has failed to make in this case.

We do not understand appellees to disagree with any part of this analysis except the last, which they attempt to transmute into a materially different and unacceptably lax test, for which they offer no supporting authority. They have therefore utterly failed to carry the burden of justifying the discriminatory structure of the axle tax.

a. The heart of appellees' defense of the axle tax—whose economic incidence, appellees concede (see Mot. to Dis. 7-8), falls almost entirely on operators of vehicles registered outside Pennsylvania—is that the offsetting registration fee reductions for Pennsylvania-based vehicles merely accomplished a redistribution of a tax burden that had previously fallen too heavily on local motor carriers. Appellees invoke (*id.* at 12) the uncontroversial principle that interstate business can be made to pay its own way and accuse us of asking the Court to rule that a state may "never . . . change its tax structure to increase the relative tax burden on interstate commerce" (*id.* at 10).

As we explain shortly, this argument mischaracterizes our position. More fundamentally, however, it is based on little more than repeated, unsubstantiated assertions of its major premise: that the discrimination inherent in the axle tax was necessary to redress a pre-existing imbalance in tax burdens. This begins with the reformulation of the first question presented, which makes the claim

that "the resulting tax distribution [following adoption of the axle tax] still weighs more heavily on intrastate commerce than interstate commerce" (Mot. to Dis. i), and continues in the body of the argument (*e.g.*, *id.* at 14). One looks in vain, however, in the statute itself, in the record, or in appellees' motion for the careful economic analysis that might sustain this key assumption underlying appellees' position. Instead, the sole purpose stated in the statute is to aid Pennsylvania's unemployed (see J.S. App. 84a-85a), while the motion contains nothing more than a vague and general assertion that certain taxes or fees, notably the fee for motor vehicle registration, are directly paid only by Pennsylvania-registered vehicles and are substantial in amount.

Appellants' position, of course, is not that a state is "frozen . . . forever" (Mot. to Dis. 12) in a tax scheme that fails to allocate its burdens fairly between local and interstate commerce. Rather, the important point is that effectuation of the federal constitutional interest in protecting interstate commerce from unfair treatment at the hands of local, parochial interests requires close scrutiny of taxes that appear to fall solely or disproportionately on interstate commerce. The cases cited in the Jurisdictional Statement (at 18-23) show that this Court is not prepared to accept uncritically the word of local or state taxing authorities that there is no unfairness in a facially or structurally discriminatory levy. Rather, the burden is on those authorities to show, by precise and economically meaningful analysis, that the challenged tax compensates for some other tax on essentially identical activities that is paid only by local businesses.[2]

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[2] It is therefore immaterial that Pennsylvania had increased registration fees three years before its adoption of the axle tax and the neutralizing registration fee reductions. See Mot. to Dis. 8 n.2. Those increases—no doubt prompted by the many years of high inflation that had passed since the previous adjustment of registration fees—were plainly no part of a rational and considered plan to allocate the costs of highway maintenance fairly between

Appellees' disclaimer of the relevance of the complementary tax doctrine (Mot. to Dis. 16 n.4) is particularly puzzling, for, as the Supreme Court of Pennsylvania correctly recognized (J.S. App. 33a-34a), it is only that doctrine that can save the validity of a tax like the axle tax. As cases like *Armco* and *Minneapolis Star* make clear, the mere fact that other, larger, and generally similar taxes exist is insufficient to justify a tax challenged because it falls solely or predominantly on a constitutionally protected entity (see J.S. 22). Rather, as shown at J.S. 22-23, the state must demonstrate that the challenged tax compensates directly and precisely for a specific tax imposed on local interests for a substantially equivalent event. By abandoning the rationale on which their victory below was predicated, and by totally ignoring the holdings, reasoning, and implications of the Commerce Clause decisions of the last five years on which appellants relied (see J.S. 19, 22-23), appellees have cut themselves adrift from any even arguable basis for sustaining the axle tax.

Certainly *Maryland* v. *Louisiana*, 451 U.S. 725 (1981), the only case relevant to this issue that appellees even bother to mention, does not support their argument. *Maryland* does indeed hold that the entire taxing scheme must be examined to determine whether a challenged tax actually discriminates against interstate commerce (see *id.* at 756). But this was in the course of finding that Louisiana's first-use tax, though facially neutral, was discriminatory when considered with the rest of the State's tax structure. The Court did not thereby also suggest that the discrimination it had detected could be justified by the mere existence of other taxes that were

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local and out-of-state vehicles. The reductions made in 1983, designed to assure that the burden of the axle tax fell entirely on out-of-state vehicles, were also no part of a rational restructuring of tax burdens, else reductions would also have been made for smaller vehicles to which the axle tax was not applicable (see J.S. 23 n.18).

imposed on locally produced gas. Rather, it then turned to the compensatory tax doctrine as the legal measure of the validity of Louisiana's structurally discriminatory first-use tax (*id.* at 758-759); the tax failed to qualify as a valid compensatory tax in *Maryland* for much the same reasons Pennsylvania's axle tax fails here.

b. Appellees also take issue with our contention (see J.S. 16-18) that the decision below conflicts with decisions of several other state supreme courts. But their bald assertion (Mot. to Dis. 16) that no conflict exists utterly fails to distinguish the decision of the Supreme Court of Vermont in *Conway* striking down a facially neutral Vermont highway tax that was accompanied by offsetting registration fee reductions. In fact, as Vermont recognizes in its pending conditional cross-petition in *Conway*, that decision "is in direct conflict with a subsequently issued decision of the Supreme Court of Pennsylvania upholding an analytically indistinguishable taxing scheme" (No. 86-276 Cross-Pet. 6), and "the Vermont and Pennsylvania decisions cannot both be correct interpretations of the Commerce Clause" (*id.* at 8).[3]

2. ***Discriminatory Effect.***

It is our further submission that, wholly apart from the objection that the incidence of the axle tax has fallen

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[3] Appellees seek (Mot. to Dis. 15) to distinguish the rulings of the Maine and New Hampshire courts on the ground that the taxes at issue in those cases were, in contrast to the Pennsylvania and Vermont taxes, not facially neutral. They fail to perceive that this distinction is completely irrelevant to the basis on which they defend the axle tax—*viz.*, that it is permissible to adopt a tax falling solely on out-of-state truckers if that tax redresses a previously existing imbalance arising from the incidence of other taxes or fees on locally-registered vehicles. Whatever its merit, that argument plainly applies whether the challenged tax is facially discriminatory or facially neutral; accordingly, the decisions of the Maine and New Hampshire courts are flatly inconsistent with appellees' defense of the axle tax.

exclusively on vehicles registered outside Pennsylvania, both the axle tax and the marker fee operate in a manner that effectively discriminates against interstate commerce by advantaging carriers that conduct most of their operations within Pennsylvania. These carriers, which turn out to be principally ones whose vehicles are registered in Pennsylvania, are able to spread the fixed cost of the tax over a larger base of Pennsylvania operations, thereby achieving dramatically lower per-mile tax costs than their out-of-state counterparts. The Jurisdictional Statement incorporated by reference (J.S. 24-25) the arguments made with respect to the identical issue in the Jurisdictional Statement in *American Trucking Associations, Inc.* v. *Gray*, appeal docketed, No. 86-358 (U.S. Sept. 3, 1986). Most of appellees' responses to this contention are dealt with in the Reply Brief being filed contemporaneously in *Gray*. There are three additional points that require response here.

a. Appellees contend (Mot. to Dis. 21-22) that mileage-related highway taxes impose "added administrative costs" and thus are not "a workable alternative to flat taxes." In support of this they assert (*ibid.*) that only a small percentage of vehicles are required to report their mileages for purposes of Pennsylvania taxes and that New York incurs substantial administrative expenses in connection with its mileage-based tax.

It is hard to take this contention seriously. Appellees have apparently overlooked the fact that Pennsylvania, like all other states, already collects mileage-related highway taxes—namely, motor fuel sales and use taxes. Moreover, all interstate carriers that pay the axle tax are also subject to the fuel use tax, whether their vehicles are registered in Pennsylvania or outside it. Compare 75 Pa. Cons. Stat. Ann. §§ 9901 *et seq.* with 72 Pa. Cons. Stat. Ann. §§ 2617.1 *et seq.* Thus, while there may be some intrastate carriers that currently file no mileage reports, appellees surely err when they assert (Mot. to Dis. 21)

that most motor carrier vehicles need not make such filings in Pennsylvania. In any event, it seems indisputable that if the revenues now raised by the axle tax were instead raised by an increase in the fuel sales and use taxes (which are nondiscriminatory because they are reasonably related to the highway wear and tear motor carrier operations actually cause), the discrimination inherent in the flat tax could be eliminated without a penny of additional administrative cost for the State.[4]

b. Second, appellees take the liberty (Mot. to Dis. 23-24) of recharacterizing our argument as being addressed exclusively to the question of excessiveness. In fact, appellants have never challenged the *level* of either the marker fee or the axle tax. Rather, as the Pennsylvania Supreme Court recognized (J.S. App. 25a & n.15), appellants have argued that non-proportional highway taxes like the axle tax violate both the anti-discrimination (third prong) and the fair relationship (fourth prong) requirements of *Complete Auto*. Appellees are quite mistaken in their apparent supposition that the Commerce Clause is not violated by a discriminatory tax so long as the tax is not excessive.

c. Finally, appellees carry out their theme by suggesting (Mot. to Dis. 24-25) that if a tax imposed by any state—however much it may discriminate against inter-

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[4] While it is true that New York has a weight-mileage tax, the adoption of which could entail some additional administrative burden for Pennsylvania, appellees err in ascribing New York's tax administration expenses principally to that tax. They overlook the fact that "[t]he truck mileage tax and the fuel use tax are reported on one report form." Amended Affidavit of Joseph H. Reohr, Jr., at 10, attached as Exhibit B to the defendants' motion for summary judgment in one of these cases (No. 267 C.D. 1983). Thus, much of the administrative expense referred to would likely be incurred in any event in administering the fuel use tax. Moreover, because fuel taxes are comparably effective in fairly distributing the burden of maintenance among highway users, we have not contended that Pennsylvania must adopt a weight-mileage tax to rectify the discriminations present in its existing system. See *Gray* J.S. 21-22.

state commerce—is not excessive, no attention need be paid to concerns about the cumulative impact of the adoption of such taxes by many states in which the affected interstate businesses operate. This contention runs directly counter to the basic protective purpose of the Commerce Clause and is answered in the Jurisdictional Statement in *Gray* (at 18-19).[5]

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[5] A similar issue is before this Court in *National Can Corporation* v. *State of Washington, Department of Revenue*, prob. juris. noted, No. 85-2006 (U.S. Oct. 6, 1986). That case involves a tax on wholesaling within Washington and another of equal size on manufacturing in the State. Appellants in that case are companies that either manufacture goods in Washington for sale in other states or manufacture outside Washington for sale in that State. The tax scheme is attacked as discriminatory because a business that both manufactures and sells within Washington need pay only one of the taxes; it is defended as non-discriminatory on the ground that exactly the same tax is paid by both interstate and intrastate businesses. The discriminatory impact of the tax at issue in *National Can* becomes fully evident only upon consideration of the effect of adoption of an identical tax by the other states in which the appellants do business, the result of which would be to double the tax cost of interstate ventures as compared to their intrastate competition.

It is well settled that the potential cumulative burdens of adoption of similar taxes by more than one state must generally be considered in determining questions of discrimination under the Commerce Clause. See cases cited at *Gray* J.S. 18-19. The kind of tax structure involved in *National Can* would therefore not ordinarily be countenanced; the question in *National Can* is whether there is an exception to this principle in the specific context of the compensatory tax doctrine. Here, however, the State has disclaimed reliance upon the compensatory tax doctrine. Moreover, in contrast to *National Can*, this case is not one where the tax is or could be defended on the ground that it imposes precisely equal burdens on interstate and intrastate commerce. While a reversal in *National Can* would be damaging to the already weak position of the appellees in this case, an affirmance would not sustain the validity of the Pennsylvania tax.

Respectfully submitted.

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v.

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Appellees

On Appeal from the Supreme Court of Pennsylvania

JOINT APPENDIX

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PROBABLE JURISDICTION NOTED NOVEMBER 10, 1986

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-357

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On Appeal from the Supreme Court of Pennsylvania

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COMMONWEALTH COURT OF PENNSYLVANIA

No. 315 C.D. 1982

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners

v.

ROBERT K. BLOOM, SECRETARY OF THE DEPARTMENT OF REVENUE OF THE COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1982	
Feb 16	Complaint filed.
	* * * *
" 25	Stipulation regarding refunds filed and approved.
	* * * *
May 18	Order certifying class action.
	* * * *
1983	
June 13	Order scheduling trial for June 16, 1983.
	* * * *
Sept 19	Argument heard before Judge Williams, Jr.
Oct 17	Memorandum Opinion and Order filed (J. Williams, Jr.), invalidating marker fee and ordering refunds of payments for identification markers for the year beginning April 1, 1982 to proceed in accordance with Stipulation of the parties.

DATE	PROCEEDINGS
1983	
Oct 27	Respondents' exceptions filed.
	* * * *
1984	
Dec 11	Oral argument held (before the Court en banc).
Feb 5	Opinions and Order filed overruling exceptions to the Opinion and Order of Judge Robert W. Williams, Jr., dated October 17, 1983.

COMMONWEALTH COURT OF PENNSYLVANIA

No. 267 C.D. 1983

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners

v.

ROBERT K. BLOOM, SECRETARY OF THE DEPARTMENT OF REVENUE OF THE COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1983	
Jan 28	Petition filed.
	* * * *
Feb 11	Stipulation concerning refunds filed.
	* * * *
Mar 1	Answer filed.
	* * * *
" 23	Petitioners' Reply filed.
	* * * *
Dec 12	Order certifying class action.
1984	
Feb 29	Additional Stipulation concerning refunds filed.
	* * * *
Apr 19	Petitioners' Motion for Summary Judgment filed.
	* * * *

DATE	PROCEEDINGS
1984	
Aug 24	Respondents' Motion for Summary Judgment filed.
	* * * *
Sept 12	Petitioners' Answer to Respondents' Motion for Summary Judgment filed.
	* * * *
Dec 11	Argued (before the Court en banc).
1985	
Feb 5	Opinion filed. (J. Williams, Jr.) Dissenting (President Judge Crumlish, Jr. and Judge Barry).
" 5	Petitioners' motion for summary judgment is granted. The Axle Tax is hereby declared to be violative of the Commerce Clause of the United States Constitution. Refunding of Axle Tax payments for tax years beginning April 1, 1983 shall proceed in accordance with the parties' Stipulations.

COMMONWEALTH COURT OF PENNSYLVANIA

No. 160 C.D. 1984

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners

v.

JAMES I. SCHEINER, SECRETARY OF THE DEPARTMENT OF REVENUE OF THE COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1984	
Jan 17	Petition filed.
	• • • •
Feb 21	Respondents' Preliminary Objections to Petition for Review filed.
	• • • •
" 26	Respondents' Brief in Support of Preliminary Objection filed.
Aug 27	Brief of Petitioners in Opposition to the Preliminary Objections of Respondents filed.
	• • • •
Dec 11	Argued (before the Court en banc).
1985	
Feb 7	Opinion filed sustaining Respondents' preliminary objection (J. MacPhail). Dissenting (President Judge Crumlish, Jr. and Judge Williams, Jr.).

SUPREME COURT OF PENNSLYVANIA
MIDDLE DISTRICT

Nos. 11, 12 & 19 M.D. Appeal Dockets 1985

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellees,

v.

JAMES I. SCHEINER, SECRETARY OF THE DEPARTMENT OF REVENUE, *et al.*,
Appellants.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1985	
Mar 21	Original Record one part filed (Case No. 19, appeal from Commonwealth Court No. 160 C.D. 1984).
Apr 11	Original Record filed (Cases No. 11 and No. 12, appeals from Commonwealth Court Nos. 315 C.D. 1982 and 267 C.D. 1983).
Apr 24	Supplemental Record filed (Case No. 19).
1986	
May 6	Decision reversed in part; Affirmed in part, Larsen, J. Mr. Chief Justice Nix files a Concurring and Dissenting Opinion in which Mr. Justice McDermott joins. (Cases No. 11, No. 12, and No. 19).

MARKER FEE CASE

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 315 C.D. 82

CLASS ACTION

AMERICAN TRUCKING ASSOCIATIONS, INC.
1616 "P" Street, N.W.
Washington, D.C. 20036,

OLD DOMINION FREIGHT LINE, INC.
P.O. Box 2006,
High Point, North Carolina 27261,

and

ANDERSON TRUCKING SERVICE, INC.
203 Cooper Avenue North,
Saint Cloud, Minnesota 56301,

individually and on behalf of a class of
interstate motor carriers similarly situated,
Plaintiffs,

v.

ROBERT K. BLOOM, Secretary of the
Department of Revenue of the
Commonwealth of Pennsylvania
11th Floor Strawberry Square
Harrisburg, PA 17127,

LEROY S. ZIMMERMAN, Attorney General
of the Commonwealth of Pennsylvania,
16th Floor Strawberry Square
Harrisburg, PA 17127, and

DANIEL F. DUNN, Commissioner of the State Police
of the Commonwealth of Pennsylvania
1800 Elmerton Avenue
Harrisburg, PA 17109,
Defendants.

COMPLAINT, OR IN THE ALTERNATIVE, PETITION FOR REVIEW

Nature of the Action

1. This is a class action seeking to enjoin and have declared unconstitutional under both the United States and Pennsylvania Constitutions the road tax identification marker requirement imposed upon interstate motor carrier vehicles in Section 2102 of the Vehicle Code, 75 Pa. C.S. § 2102. This amendment to the Vehicle Code took effect on August 18, 1980, and requires each motor carrier vehicle (defined as "a truck, truck tractor or combination having a gross weight or registered gross weight in excess of 17,000 pounds") entering into the Commonwealth to bear an identification marker costing $25.00 per year to demonstrate its compliance with the Motor Carrier Road Tax Act, 72 P.S. § 2617.1, et seq. An exception, however, is provided "for vehicles registered in this Commonwealth"; for such vehicles registered in Pennsylvania "the vehicle identification marker shall be deemed a part of and included in the vehicle registration fee."

2. The plaintiffs, on behalf of themselves and the class of all interstate motor carriers similarly situated, contend and in this action seek to prove that Section 2102 of the Vehicle Code, on its face and in its practical effect:

(a) discriminates against and burdens interstate commerce in violation of the Commerce Clause of the U.S. Constitution, Article I, Section 8;

(b) deprives out-of-state motor carriers of rights and subjects them to obligations not shared by motor carriers registered in the Commonwealth in violation of the Privileges and Immunities Clause of the U.S. Constitution, Article IV, Section 2;

(c) is incompatible with and contrary to federal law and regulations on a subject matter in which the federal

standards preempt and preclude inconsistent state requirements in violation of the Supremacy Clause of the Constitution, Article VI, Section 2;

(d) deprives out-of-state motor carriers of the equal protection of the laws in violation of the Fourteenth Amendment to the U.S. Constitution and of rights, privileges or immunities secured by the Constitution and laws of the United States in violation of 42 U.S.C. § 1983; and

(e) constitutes a tax upon a single class of subjects within the territorial limits of the Commonwealth, which tax is not uniform in its impact upon out-of-state motor carriers and motor carriers registered in Pennsylvania in violation of the uniformity provision of the Pennsylvania Constitution, Article 8, Section 1.

3. In the alternative, in Count VII of the Complaint, plaintiffs seek a declaration that motor carrier vehicles registered in states with which the Commonwealth of Pennsylvania has entered into bilateral apportioned registration reciprocity agreements pursuant to the authority declared in Section 6141 et seq. of the Vehicle Code, 75 Pa. C.S. § 6141-6153, shall be deemed to be "vehicles registered in this Commonwealth" and thus exempt from the payment of the identification marker fee under Section 2102(b) of the Vehicle Code, 75 Pa. C.S. § 2102(b). For the purpose of that Count of the Complaint, plaintiffs seek to certify a class limited to carriers operating motor carrier vehicles registered in any of those states which have entered into apportioned registration reciprocity agreements with Pennsylvania.

• • • •

Count I—Discrimination against Interstate Commerce

41. The averments of paragraphs 1-40 are incorporated herein as if fully set forth below.

42. The imposition of a yearly $25.00 marker fee exclusively upon motor carrier vehicles registered outside of Pennsylvania for the privilege of using the highways of the Commonwealth in interstate commerce constitutes invidious and unlawful discrimination against interstate commerce insofar as it imposes burdens on interstate motor carriers in order to conduct interstate commerce in Pennsylvania that are not shared by Pennsylvania-based carriers.

43. The reference in Section 2102 to the fact that Pennsylvania-based motor carrier vehicles have paid the $25.00 marker fee as part of their registration fee is purely a pretext to disguise facial discrimination against interstate commerce in that any increases in such registration fees enacted in Act 68 were independent of and not correlative to the increase from $2.00 to $25.00 in the amount of the identification marker fee.

44. Under Article I, Section 8 of the United States Constitution, discrimination against interstate commerce, such as by conditioning the right of an interstate motor carrier to utilize the highways of Pennsylvania upon the payment of fees or costs not shared by carriers registered in Pennsylvania, is unlawful.

Count II—Burden upon Interstate Commerce

45. The averments of paragraphs 1-40 are incorporated herein as if fully set forth below.

46. The $25.00 marker fee imposed upon out of state motor carrier vehicles wishing to utilize the highways of Pennsylvania in order to conduct interstate commerce, regardless of how minimal or infrequent are the contacts of such vehicles with Pennsylvania, constitutes an unlawful burden upon interstate motor carriers because:

(a) It is imposed irrespective of the existence of any substantial nexus between the affected interstate motor carriers and the Commonwealth of Pennsylvania;

(b) It is imposed without any regard or concern for the magnitude of the affected motor carrier's business within the Commonwealth of Pennsylvania or any apportionment based upon the relative magnitude of an affected motor carrier's business within Pennsylvania and the carrier's gross volume of business in all states;

(c) It is facially discriminatory between Pennsylvania-based carriers and carriers based in other jurisdictions;

(d) It is wholly unrelated to the volume, value or nature of the services provided by the Commonwealth of Pennsylvania to any affected interstate motor carrier; and

(e) It is wholly unrelated to the magnitude or nature of any benefit received by or conferred upon any affected interstate motor carrier by the Commonwealth of Pennsylvania or arising from the operations of an affected motor carrier within the Commonwealth of Pennsylvania.

47. For this reason, the $25.00 marker fee imposed by Section 2102 upon each and every interstate motor carrier vehicle registered beyond the borders of the Commonwealth and wishing to utilize the highways of Pennsylvania in interstate commerce constitutes an unlawful burden upon such commerce under Article I, Section 8 of the United States Constitution.

* * * *

Count VII—Discrimination Against Interstate Motor Carriers with Vehicles Registered in States with which Pennsylvania Has Entered into Apportioned Registration Reciprocity Agreements

62. The averments of paragraphs 1-40 are incorporated herein as if fully set forth below.

63. The application of the requirements of Section 2102 to interstate motor carriers whose vehicles are registered in states with which Pennsylvania has entered

into apportioned registration reciprocity agreements compels such carriers to pay a greater total for registration and marker fees to Pennsylvania than will carriers subject to the same agreements and traveling the same proportion of miles in Pennsylvania whose vehicles are Pennsylvania-based.

64. Such discrimination against interstate motor carriers based solely upon the fact that their vehicles are registered outside of Pennsylvania is facially violative of the Commerce Clause.

65. Under Section V(B) of the International Registration Plan, however, carriers registered in one such state are supposed to be treated as fully registered in every jurisdiction in which the agreement is in effect.

66. Accordingly, to avoid such patent discrimination against interstate motor carriers from states with which Pennsylvania has entered into apportioned registration reciprocity agreements, this Court should, pursuant to Section V(B) of the International Registration Plan, declare such vehicles to be deemed registered in the Commonwealth of Pennsylvania and therefore exempt under Section 2102(b) from payment of the $25.00 marker fee by virtue of such registration.

WHEREFORE, plaintiffs pray this Honorable Court:

1. To declare that Section 2102 of Title 75 is unlawful, unconstitutional and void insofar as the $25.00 identification marker fee it imposes upon interstate motor carriers to travel upon the highways of this Commonwealth violates the Commerce Clause, the Privileges and Immunities Clause, the Supremacy Clause, and the Fourteenth Amendment to the United States Constitution, Article VIII, Section 1 of the Pennsylvania Constitution, and 42 U.S.C. § 1983.

2. To enjoin all enforcement of Section 2102 of Title 75 by defendants and persons within their jurisdiction, authority and control, including the enforcement mechanisms provided in Section 2103 and 2104 of Title 75.

3. To order defendants immediately to refund and disgorge any $25.00 payments received from interstate motor carriers on account of marker fees for the year commencing April 1, 1982.

4. To grant such other relief as may be deemed appropriate, including costs and attorney's fees under 42 U.S.C. § 1988.

Alternatively, on behalf of a class of all motor carriers with vehicles registered in any states with which Pennsylvania has entered into bilateral apportioned registration reciprocity agreements, pursuant to Count VII of the Complaint, plaintiffs pray this Honorable Court:

1. To declare that such vehicles shall be considered registered in the Commonwealth of Pennsylvania so as to be exempt from the $25.00 marker fee under Section 2102(b).

2. To enjoin all enforcement of Section 2102 of Title 75, including by the means set forth in Sections 2103 and 2104 of Title 75 against such plaintiffs.

3. To order defendants immediately to refund and disgorge any $25.00 marker fee payments received from such interstate motor carriers for the year commencing April 1, 1982.

4. To grant such other relief as may be deemed appropriate, including costs and attorney's fees under 42 U.S.C. § 1988.

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IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 315 C.D. 1982

CLASS ACTION

AMERICAN TRUCKING ASSOCIATIONS, INC, *et al.*,
Petitioners

v.

ROBERT K. BLOOM, Secretary of the
Department of Revenue, *et al.*,
Respondents

ANSWER AND NEW MATTER

Defendants hereby interpose and file their answer and new matter:

ANSWER

1-3. ADMITTED only insofar as these paragraphs purport to characterize the nature of the instant action. LEGAL CONCLUSIONS herein require NO RESPONSE.

• • • •

41. The answers to paragraphs 1-40 are incorporated herein as if fully set forth.

42. DENIED that the twenty-five dollar ($25.00) marker fee is imposed only upon motor vehicles registered outside of Pennsylvania. To the contrary, Pennsylvania-registered vehicles pay the twenty-five dollar ($25.00) fee. LEGAL CONCLUSIONS herein require NO RESPONSE.

43-44. DENIED. States LEGAL CONCLUSIONS as to which NO RESPONSE is required.

45. The answers to paragraphs 1-40 are incorporated herein as if fully set forth.

46-47. DENIED. States LEGAL CONCLUSIONS as to which NO RESPONSE is required.

* * * *

62. The answers to paragraphs 1-40 are incorporated herein as if fully set forth.

63. DENIED. To the contrary, vehicles registered in states with which Pennsylvania has bilateral apportioned registration agreements and Pennsylvania vehicles which travel through states with which Pennsylvania has bilateral apportioned registration agreements pay the same registration and marker fees, assuming that such vehicles travel the same proportion of miles in the various jurisdictions which are parties to bilateral agreements.

64. DENIED. States LEGAL CONCLUSIONS as to which NO RESPONSE is required.

65. ADMITTED that the International Registration Plan so requires. DENIED that this plan is applicable to the marker fee at issue since the plan does not cover marker fees and Pennsylvania is not a party to the plan.

66. DENIED. States LEGAL CONCLUSIONS as to which NO RESPONSE is required.

NEW MATTER

67. The marker fee applies to Pennsylvania-registered vehicles and to vehicles using Pennsylvania roads.

68. The marker fee applies only to activities with a substantial nexus to the Commonwealth.

69. The marker fee is paid exclusively into the Motor License Fund.

70. The Motor License Fund is used for road repair, maintenance, construction and other related purposes.

71. The monies paid into the Motor License Fund in fiscal year 1980-81 by virtue of the marker fee, fuel tax and other charges imposed upon out-of state vehicles for use of the roads were fully expended exclusively for road repair, maintenance, construction and related purposes.

• • • •

76. The marker fee is a charge for the privilege of using Pennsylvania roads.

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

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Petitioners,

v.

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Department of Revenue, *et al.*,
Respondents.

PETITIONERS' REPLY TO RESPONDENTS' NEW MATTER

Petitioners, American Trucking Associations, Inc., et al., reply to respondents' New Matter, in accordance with the paragraph numbers thereof, as follows:

* * * *

68. DENIED. Petitioners are advised that the allegation of this paragraph constitutes a conclusion of law to which no response is required. To the extent that facts are alleged in this paragraph, the allegation is DENIED AS STATED. While a vehicle which does not enter the Commonwealth need not display an identification marker, the nature of the interstate transportation services provided by petitioners and their fellow class members requires them to qualify substantially all of their vehicles for operation in Pennsylvania, notwithstanding that in any given year, some of those vehicles may never enter into the Commonwealth or may travel only a few miles upon the roads of the Commonwealth. By way of further

answer, the averments of paragraphs 14-18 of the Petition for Review are incorporated herein.

* * * *

76. ADMITTED IN PART AND DENIED IN PART AND PROOF DEMANDED. Petitioners agree with respondents' characterization of the vehicle identification marker fee as a privilege tax. As to the remainder of the allegation of this paragraph, after reasonable investigation, petitioners are without sufficient knowledge or information to form a belief as to the truth of the allegation.

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 315 C.D. 1982

CLASS ACTION

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners,

v.

ROBERT K. BLOOM, *et al.*,
Respondents.

ORDER

AND NOW, this 18 day of May, 1982, pursuant to the Stipulation of counsel for the respective parties to this action, it is

ORDERED AND DECREED

that:

1. This action shall be certified to proceed as a class action.

2. The class to be represented by the named petitioners in connection with Counts I-VI of their Petition for Review is certified to consist of all interstate carriers whose motor carrier vehicles are registered outside of Pennsylvania and are subject to the road tax identification marker requirement of Section 2102 of the Vehicle Code and who now are or may in the future become liable for payment of the yearly marker fee of $25.00 on account of such motor carrier vehicles.

3. The subclass to be represented by the named petitioners in connection with Count VII of their Petition for

Review is certified to consist of all interstate carriers whose motor carrier vehicles are registered in any of the states or provinces with which Pennsylvania has entered into bilateral apportioned registration reciprocity agreements, whose vehicles are subject to the road tax identification marker requirement of Section 2102 of the Vehicle Code, and who now are or may in the future become liable for payment of the yearly marker fee of $25.00 on account of such motor carrier vehicles.

/s/ John A. MacPhail

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 315 C.D. 1982

CLASS ACTION

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners,

v.

ROBERT K. BLOOM, Secretary of
the Department of Revenue, *et al.*,
Respondents.

JOINT STIPULATION OF FACTS

The parties to the captioned action stipulate that the following facts are true and undisputed. The parties reserve argument as to the relevancy of some of these facts.

I. *Nature of The Marker Fee*

1. The $25 marker decal fee is a tax for the privilege of using Pennsylvania roads.

2. For vehicles registered in Pennsylvania the marker fee "shall be deemed a part of and included in the vehicle registration fee." 75 Pa. C.S. § 2101(b).

3. The marker fee is imposed upon motor carrier vehicles which have gross weight, or registered gross weight, in excess of 17,000 pounds. The parties disagree as to the application of the marker fee requirement to Pennsylvania-registered vehicles.

4. Marker fees are credited to the Motor License Fund.

5. Motor License Fund moneys are expended for road-related purposes.

6. The administrative costs associated with the marker decal requirement total approximately $5.00 per vehicle.

II. *Petitioners' Operations*

7. Petitioner American Trucking Associations, Inc. ("ATA") is a national non-profit corporation organized and operating under the non-profit corporation laws of the District of Columbia and with its principal place of business located there. ATA is a federation of 51 state trucking associations, including the District of Columbia and 13 national conferences. It represents every type and geographical scope of motor carrier operation in the United States. It represents over 10,000 interstate for-hire carriers, and tens of thousands of private and local carriers, many of whose motor carrier vehicles are registered and qualified for operation within the Commonwealth of Pennsylvania and are subject to the requirements of 75 Pa. C.S.A. § 2102(b) ("Section 2102(b)").

8. "Qualified for operation" has the following meaning: The display of the required indicia in order to lawfully operate over the highways of the Commonwealth.

9. Petitioner Old Dominion Freight Line, Inc. ("Old Dominion") is a Virginia corporation with its principal place of business located in North Carolina. It is an interstate motor carrier as defined in the Interstate Commerce Act operating under certificates of authority issued by the Interstate Commerce Commission. At present it operates approximately 814 motor carrier vehicles, all of which are registered and qualified for operation within the Commonwealth of Pennsylvania and are subject to the requirements of Section 2102(b).

10. Petitioner Anderson Trucking Service, Inc. ("Anderson Trucking") is a Minnesota corporation with its principal place of business located in Minnesota. It is an

interstate motor carrier as defined in the Interstate Commerce Act operating under certificates of authority issued by the Interstate Commerce Commission. At present it operates approximately 492 motor carrier vehicles, all of which are registered and qualified for operation within the Commonwealth of Pennsylvania and are subject to the requirements of Section 2102(b).

11. During the most recent period for which statistics are available, calendar year 1981, the 814 motor carrier vehicles of petitioner Old Dominion travelled a total of 66,739,086 miles. Dividing 66,739,086 by 814, Old Dominion's vehicles travelled an average of 81,989 miles each everywhere.

12. Old Dominion's vehicles travelled a total of 2,216,952 miles in Pennsylvania in 1981. Dividing 2,216,952 by 814, these vehicles travelled an average of 2,724 miles each in Pennsylvania.

13. The number of Old Dominion's vehicles which travelled in Pennsylvania, and the number of Pennsylvania miles travelled by each, is not presently known. There is no assertion in paragraph 12 that all or most of Old Dominion's vehicles did travel in Pennsylvania.

14. Petitioner Old Dominion's 814 motor carrier vehicles travelled 2,216,952 miles in Pennsylvania, which is 3.32 percent of the carrier's total mileage.

15. Old Dominion paid the $25.00 marker decal fee for a marker effective for the year beginning April 1, 1981, for each of its 814 vehicles, plus 231 replacement vehicles, at a total cost of $26,125.

16. During the months January, February and March, 1981, Old Dominion's vehicles bore marker decals effective for the annual period ending March 31, 1981, most of which had cost $2 each and some of which had cost $25.

17. The average cost of the markers per mile travelled in Pennsylvania to petitioner Old Dominion for calendar year 1981 was $.0117, based on a marker decal cost of $25 each.

18. During the most recent period for which statistics are available, calendar year 1981, the 492 motor carrier vehicles of petitioner Anderson Trucking travelled a total of 25,379,399 miles. Dividing 25,379,399 by 492, Anderson's vehicles traveled an average of 51,584 miles each everywhere.

19. Anderson's vehicles travelled a total of 967,507 miles in Pennsylvania in 1981. Dividing 967,507 by 492, these vehicles travelled an average of 1,966 miles each in Pennsylvania.

20. The number of Anderson's vehicles which travelled in Pennsylvania, and the number of Pennsylvania miles travelled by each, is not presently known. There is no assertion in paragraph 19 that all or most of Anderson's vehicles did travel in Pennsylvania.

21. Petitioner Anderson's 492 motor carrier vehicles travelled 967,507 miles in Pennsylvania, which is 3.81 percent of the carrier's total mileage.

22. Anderson Trucking paid the $25.00 marker decal fee for a marker effective for the year beginning April 1, 1981 for each of its 492 vehicles, plus 62 replacement vehicles, at a total cost of $13,850.

23. During the months January, February and March, 1981, Anderson's vehicles bore marker decals effective for the annual period ending March 31, 1981, most of which had cost $2 each and some of which had cost $25.

24. The average cost of the markers per mile traveled in Pennsylvania to petitioner Anderson Trucking in 1981 was $.0143, based on a marker decal cost of $25 each.

25. Apache Tomato Co., Inc., is a corporation organized under the laws of New Jersey with its principal office located in Colts Neck, New Jersey. During 1981, the company operated three 2-axle trucks in the marketing of tomatoes. In 1981, the three company vehicles made nine trips between Apache's Colts Neck office and the Food Center located at the Philadelphia side of the Walt Whitman Bridge. The three vehicles display the Pennsylvania fuel tax marker. In making their nine trips in 1981 to the Food Center, the company's vehicles operated 6 miles over Pennsylvania roads.

26. The number of Pennsylvania miles travelled by each of Apache Tomato's vehicles is not presently known. There is no assertion in paragraph 25 that all or most of Apache's vehicles did travel in Pennsylvania.

27. A. Leander McAlister Trucking ("McAlister") is a corporation organized under the laws of Texas with its principal office located in Wichita Falls, Texas. The company operates a variety of trucking equipment as an irregular route motor common carrier certified by the Interstate Commerce Commission in MC43867. It provides service to the 48 continental United States and the District of Columbia. McAlister transports oil field commodities such as pipe, machinery and drilling rigs, heavy equipment, iron and steel articles and building materials. The entire fleet is qualified each year for travel throughout the contiguous 48 continental states.

28. In 1981, McAlister purchased 290 Pennsylvania identification markers for its 290 vehicles, at a cost of $7,250. The fleet accumulated 46,844 miles in Pennsylvania. McAlister's Pennsylvania mileage in 1981 represented less than one-half of one percent of its total fleet mileage of 10,141,955 miles. During the year 1981 the company incurred a fuel tax liability in Pennsylvania of $1,325.65.

29. The number of McAlister's vehicles which travelled in Pennsylvania, and the number of Pennsylvania miles travelled by each, is not presently known. There is no assertion in paragraph 28 that all or most of McAlister's vehicles did travel in Pennsylvania.

30. Great Basin Truck Rental, Inc. ("Great Basin") is a corporation organized under the laws of Utah with its principal offices located in Salt Lake City, Utah. The company's principal business activity is the renting and leasing of motor carrier vehicles to both private and for-hire motor carriers. The company maintains a rental fleet of approximately 150 motor carrier vehicles including 30 heavy duty inter-city truck-tractors. Its vehicles other than heavy-duty truck tractors, are used by its lessees almost exclusively within 500 miles of its rental facilities. Great Basin's lessees sometimes rent and operate one or more of its heavy duty truck-tractors to, from and through points in a wide area including all states west of the Mississippi River and the States of Illinois, Indiana, Ohio, Pennsylvania and New York. Generally, Great Basin receives little, if any, advance notice that a lessee will require the rental of one of its heavy duty truck-tractors to operate in any one of these states.

31. In 1981 Great Basin's 30 heavy duty truck-tractors operated 399,552 miles everywhere and 2,152 miles in Pennsylvania. The company purchased 30 identification markers for these vehicles in 1981 at a total cost of $750. The total fuel tax liability of the company in Pennsylvania in 1981 was $71.37.

32. The number of Great Basin's vehicles which travelled in Pennsylvania, and the number of Pennsylvania miles travelled by each, is not presently known. There is no assertion in paragraph 31 that all or most of Great Basin's vehicles did travel in Pennsylvania.

33. The class represented by the named petitioners in connection with Counts I-VI of their Petition for Review has been certified to consist of all interstate carriers whose motor carrier vehicles are registered outside of Pennsylvania and are subject to the road tax identification marker requirement of Section 2102 of the Vehicle Code and who now are or may in the future become liable for payment of the yearly marker fee of $25.00 on account of such motor carrier vehicles.

34. The subclass represented by the named petitioners in connection with Count VII of their Petition for Review has been certified to consist of all interstate carriers whose motor carrier vehicles are registered in any of the states or provinces with which Pennsylvania has entered into bilateral apportioned registration reciprocity agreements, whose vehicles are subject to the road tax identification marker requirement of Section 2102 of the Vehicle Code, and who now are or may in the future become liable for payment of the yearly marker fee of $25.00 on account of such motor carrier vehicles.

35. Pursuant to Section 2102, the Commonwealth has received payment of a marker fee of $25.00 per vehicle, for vehicles operated on Pennsylvania roads, from most members of the petitioner classes for the issuance of marker decals effective for the period from April 1, 1982 to March 31, 1983.

36. Exhibit 1 is a tabulation of the fuel reporting laws of all fifty states and the District of Columbia with respect to vehicle identification marker fees.

37. If each state in which plaintiff Old Dominion operates amended its fuel reporting laws to require that all vehicles entering the state bear an identification marker which cost $25.00, and if Old Dominion purchased markers for the same vehicles, under these circumstances, as it actually did in 1981, from each state in which it operates its vehicles, the cumulative impact

of such fees on plaintiff would be approximately $350,000.00.

38. The prices which motor carriers charge their customers are based, *inter alia*, on costs of doing business, including highway user fees imposed by the states in which the carriers' vehicles operate.

39. Old Dominion's net pre-tax income in fiscal year 1981 was $51,410.

40. Old Dominion's 1981 rates did not reflect the costs hypothetically associated with markers described in paragraph 37.

41. If each state in which plaintiff Anderson Trucking operates amended its fuel reporting laws to require that all vehicles entering the state bear an identification marker which cost $25.00, and if Anderson purchased markers for the same vehicles, under these circumstances, as it actually did in 1981, from each state in which it operates its vehicles, the cumulative impact of such fees on plaintiff would be approximately $446,000.00.

42. Anderson's net pre-tax income for fiscal year 1981 was $2,531,726.

43. Anderson's 1981 rates did not reflect the costs hypothetically associated with markers described in paragraph 41.

44. To the extent that states offer temporary trip permits in lieu of marker decals at reasonable costs such as the Pennsylvania fee of $5.00, (See Stipulation 161, *infra.*) petitioners Old Dominion and Anderson Trucking might be able to reduce the hypothetical costs of compliance indicated in paragraphs 37 and 41 by using trip permits where such permits would meet their operating needs.

45. The hypothetical compliance cost indicated in paragraphs 37 and 41 might also be lowered if petition-

ers Old Dominion and Anderson Trucking purchased marker decals only for the states in which each vehicle actually operated. The parties disagree as to whether petitioners Old Dominion and Anderson Trucking can adequately predict which vehicles will operate in which states, thereby making it possible to avoid qualifying all of their vehicles for operation in each state for which they have federal authority.

III. *Commonwealth's Use of the Marker Fee and Certain Other Revenues Credited to the Motor License Fund*

46. Among the Motor License Fund expenditures directly benefiting motor carriers operating in Pennsylvania are expenditures for highway maintenance, highway construction, state police and construction bond debt service.

47. For the period April 1, 1981 through March 3, 1982, Motor License Fund expenditures in these categories were as follows (rounded to the nearest thousand):

Highway Maintenance	$524,986,000
Highway Construction (non-bond-funded)	79,681,000
State Police	104,200,000
Debt Service—Principal	63,655,000
Debt Service—Interest	105,428,000
Total	$877,950,000

48. Eighty-eight percent (88%) of the expenditures listed in paragraph 47 relates to highway construction and maintenance, when construction bond interest is included in computing the percentage. When construction bond interest is excluded, seventy-six percent (76%) of the expenditures listed in paragraph 47 relate to highway construction and maintenance. The parties disagree as to whether interest should be included.

49. For the period April 1, 1982 through November 30, 1982 (the most recent period for which figures are

available), Motor License Fund expenditures in these categories were as follows (rounded to the nearest thousand):

Highway Maintenance	$448,728,000
Highway Construction (non-bond-funded)	74,030,000
State Police	57,300,000
Debt Service—Principal	31,710,000
Debt Service—Interest	61,370,000
Total	$673,138,000

50. Ninety-two percent (92%) of the expenditures listed in paragraph 49 relate to highway construction and maintenance, when construction bond interest is included in computing this percentage. When construction bond interest is excluded, eighty-two (82%) of the expenditures listed in paragraph 49 relate to highway construction and maintenance. The parties disagree as to whether interest should be included.

51. For the period April 1, 1981 through November 30, 1982, Motor License Fund expenditures directly benefitting operators of vehicles which are subject to the marker fee totalled at least $1,551,088,000.

52. The expenditures referred to in paragraph 51 benefit operators of vehicles which do not pay the marker fee, including automobiles, other non-trucks, and trucks under 17,000 pounds, which use Pennsylvania roads.

53. Use of Pennsylvania roads by vehicles which are wider and heavier than automobiles necessitates higher road-related expenditures than would use of the roads by automobiles and other lightweight vehicles alone. These higher costs are incurred, *inter alia*, in the following categories: construction of road bases and surfaces; construction of bridges; paving of road shoulders; roadgrading and drainage; and truck weight facilities.

54. With the exception of certain limited segments, all of the principal routes, Interstate highways and certain four-lane facilities in Pennsylvania, are categorized as rigid pavements.

55. The *AASHTO Interim Guide for Design of Pavement Structures* defines the serviceability of a pavement as the ability to serve high-speed, high-volume automobile and truck traffic.

56. The *AASHTO Interim Guide for Design of Pavement Structures*, developed as a result of the AASHTO road test, recommends use of a "present serviceability index", a scale with a range of 0 to 5, to measure pavement serviceability. The value 5 is the highest index of serviceability (e.g., brand new road); 0 is the lowest.

57. Application of the *AASHTO Interim Guide* permits projection, based on the physical characteristics of the pavement, and an assumed traffic flow over a given period of time, of a road's expected future serviceability rating. The parties disagree as to whether this rating is hypothetical, as petitioners contend, or a reasonable projection, as respondents' contend.

58. The "terminal serviceability index" is the lowest index that will be tolerated before resurfacing or reconstruction becomes necessary.

59. AASHTO recommends a terminal serviceability index of 2.5 for major highways, 2.0 for highways with lesser traffic volumes.

60. Pavements are commonly designed to last 20 years between the time of their construction and the time they are expected to reach the terminal serviceability index.

61. During calendar year 1979, the most recent period for which detailed figures are currently available, vehicle miles travelled in Pennsylvania were approximately as follows:

Total Vehicle Miles Travelled, 1979

Total Passenger Vehicles	58,600,811,505
Auto	57,291,004,547
Motor Cycle	911,913,897
School Bus	124,376,972
Commercial Bus	273,516,089

Total Cargo Vehicles	12,844,167,335
2 Axle/4 tire	6,381,130,943
All other Single Trucks	2,806,356,994
Combination Trucks	3,656,679,398

62. Motor vehicles tend to travel primarily in the right lane of the roadway.

63. It currently costs in excess of $500,000 to pave one mile of interstate highway.

IV. *Highway User Fees*

64. All highway user charges derived from motor carrier operations conducted in the Commonwealth are credited to the Motor License Fund and expended exclusively for road-related purposes. Pennsylvania highway user charges affecting vehicles subject to the marker fee consist of:

(a) truck and truck-tractor registration fees;

(b) trailer registration fees;

(c) special hauling permit fees;

(d) Fuel Use Tax;

(e) Motor Carriers Road Tax;

(f) Oil Company Franchise Tax;

(g) Gross Receipts Tax (vehicles travelling interstate);

(h) Liquid Fuels Tax;

(i) truck and truck-tractor title fees;

(j) trailer title fees;

(k) truck and truck-tractor registration transfer fees;

(l) trailer registration transfer fees; and

(m) farm truck registration fees.

Fuel Tax And Liquid Fuels Tax

65. The Fuel Use Tax is an 11 cent per gallon tax applicable to diesel and certain other non-gasoline fuels purchased in Pennsylvania.

66. The Liquid Fuels Tax is an 11 cent per gallon tax applicable to gasoline and certain other non-diesel fuels purchased in Pennsylvania.

67. For the period April 1, 1981, through March 31, 1982, combined Fuel Use Tax and Liquid Fuels Tax revenues derived from motor carrier vehicles (i.e. vehicles with gross weight in excess of 17,000 pounds) totalled approximately $79,171,000.[1]

68. For the period April 1, 1982, through November 30, 1982, combined Fuel Use Tax and Liquid Fuels Tax revenues derived from motor carrier vehicles totalled approximately $52,191,000.

Motor Carriers Road Tax

69. The Motor Carriers Road Tax is a tax on certain liquid fuels, including gasoline and diesel fuel, calculated on the amount of fuel purchased outside of Pennsylvania but consumed on Pennsylvania roads. It excludes fuel purchased in Pennsylvania but consumed elsewhere. The tax rate is 11 cents per gallon, plus 3.5% of the average wholesale price of the fuel purchased. Motor carriers receive a credit against this tax in the amount of (a) the fuel taxes they have paid on motor fuel purchased in Pennsylvania, plus (b) 3.5% of the average wholesale price of the fuel they have purchased in the Commonwealth.

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[1] The fuel tax revenues refered to in paragraphs 66 and 67 are based on the best available estimates of miles travelled in Pennsylvania by vehicles subject to the marker fee, and the miles per gallon experienced by those vehicles. The revenues shown are thus rough approximations.

70. For the period April 1, 1981 through March 31, 1982, Motor Carriers Road Tax revenues were approximately as follows:

Road Tax	$ 5,846,855
Marker fee	10,553,654
Trip permits	320,569
Total	$16,721,078

71. For the period April 1, 1982 through November 30, 1982, Motor Carrier Road Tax Revenues were approximately as follows:

Road Tax	$4,516,219
Marker fee	2,060,665
Trip permits	221,748
Total	$6,798,632

Registration Fees

72. For the period April 1, 1981, through March 31, 1982, Pennsylvania-based single trucks which are subject to the marker fee (i.e., which weigh more than 17,000 pounds) paid total registration fees of approximately $14,326,865. This amount includes farm truck registration fees totalling $258,306.

73. For the period April 1, 1982, through November 30, 1982, the vehicles described in ¶ 72, *supra*, paid registration fees totalling approximately $10,640,939. This amount includes farm truck registration fees totalling $174,372.

74. From April 1, 1981, through March 31, 1982, Pennsylvania-based truck tractors paid registration fees totalling approximately $26,719,638. This amount includes farm truck-tractor registration fees totalling $117,498.

75. From April 1, 1982, through November 30, 1982, Pennsylvania-based truck tractors paid registration fees

totalling approximately $20,729,620. This amount includes farm truck-tractor registration fees totalling $83,294.

76. For the period April 1, 1981 through November 30, 1982, registration fees paid to Pennsylvania for vehicles, including trucks, truck-tractors and trailers, based in IRP-member[2] states other than Pennsylvania totalled $5,036,000, before refunds were paid (See Stipulations 122-125 below.) These fees are paid entirely into the Motor License Fund.

77. From April 1, 1981, through March 31, 1982, registration fees for Pennsylvania-based trailers totalled $7,063,000.

78. From April 1, 1982 through November 30, 1982, Pennsylvania-based trailer registration fees totalled $3,648,000.

79. Pennsylvania vehicle registration fees are credited exclusively to the Motor License Fund.

Special Hauling Permits

80. For the period April 1, 1981 through March 31, 1982, special hauling permit revenues, which are paid entirely into the Motor License Fund, totalled $4,842,000.

81. From April 1, 1982 through November 30, 1982, special hauling permit revenues totalled $3,142,000.

Title Fees

82. For the period April 1, 1981, through March 31, 1982, truck and truck-tractor title fees totalled approximately $4,223,862. Title fees are paid exclusively into the Motor License Fund.

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[2] IRP ("International Registration Plan") is discussed in paragraph 100, *et seq.*, *infra*.

83. For the period April 1, 1982, through November 30, 1982, truck and truck-tractor title fees totalled approximately $3,077,010.

84. From April 1, 1981, through March 31, 1982, trailer title fees totalled approximately $1,596,311.

85. From April 1, 1982, through November 30, 1982, trailer title fees totalled approximately $1,345,575.

Registration Transfer Fees

86. From April 1, 1981, through March 31, 1982, trailer registration transfer fees totalled approximately $36,916. Registration transfer fees are paid exclusively into the Motor License Fund.

87. From April 1, 1982, through November 30, 1982, trailer registration transfer fees totalled approximately $28,271.

88. For the period April 1, 1981, through March 31, 1982, truck and truck-tractor registration transfer fees totalled approximately $422,261. This includes farm truck and farm truck-tractor registration transfer fees totalling $25,294 and fees for trucks under 17,000 pounds.

89. For the period April 1, 1982, through November 30, 1982, truck and truck-tractor registration transfer fees totalled approximately $279,794. This includes farm truck and farm truck-tractor registration transfer fees totalling $20,301 and fees for trucks under 17,000 pounds.

Gross Receipts Tax

90. Each motor carrier operating in Pennsylvania is required to pay a Gross Receipts Tax of 8 mills per dollar upon the portion of its gross receipts represented by the following ratio:

$$\frac{\text{number of miles operated in Pennsylvania}}{\text{total number of miles operated}}$$

Motor carriers receive a credit against this tax in the amount of certain registration fees paid the Commonwealth.

91. Gross Receipts Tax revenues derived from vehicles operating interstate are paid into the Motor License Fund.

92. For the period April 1, 1981 through March 31, 1982, Gross Receipts Tax revenues credited to the Motor License Fund totalled $324,000.

93. From April 1, 1982 through November 30, 1982, Gross Receipts Tax revenues credited to the Motor License Fund totalled $198,000.

94. Gross Receipts Tax revenues derived from vehicles operating intrastate are credited to the General Fund.

Oil Company Franchise Tax

95. The Oil Company Franchise Tax for Highway Maintenance and Construction is a tax of 35 mills upon the dollar imposed upon revenues derived from the sale, in Pennsylvania, for marketing and distribution, of petroleum products otherwise subject to liquid fuels taxes. The Oil Company Franchise Tax took effect on July 1, 1981.

96. Oil Company Franchise Tax revenues are paid entirely into the Motor License Fund.

97. Assuming, *arguendo*, for present purposes, that this Oil Company Franchise Tax ("OCFT") is passed on to the retail fuel purchaser, motor carrier vehicles paid approximately $22,537,000 in OCFT for the period April 1, 1981, through March 31, 1982.

98. OCFT revenues derived from motor carrier vehicles totalled approximately $18,559,000 for the period April 1, 1982, through November 30, 1982.

Total Highway User Fees

99. For the period April 1, 1981, through November 30, 1982, highway user fees derived from vehicles which are subject to the marker fee totalled approximately $303,657,772.

V. *The Marker Fee and the International Registration Plan.*

100. Prior to September of 1982, Pennsylvania entered into Apportioned Registration Agreements, based upon the International Registration Plan ("IRP"), annexed hereto as Exhibit —, with twenty-three states and provinces. Apportioned registration under these Agreements was implemented in the 1982 registration year.

101. On September 15, 1982, Pennsylvania became a member jurisdiction of the IRP. Membership in the IRP automatically abrogated the Apportioned Registration Agreements. Since the terms of the IRP and all of the Agreements are essentially identical, no distinction will be drawn herein between them. Unless specifically stated otherwise, references to either the IRP or the Apportioned Registration Agreements are identical in effect.

102. Under Article III of the IRP, the registration fee for apportionable vehicles is determined: (1) by dividing the in-jurisdiction miles by the total miles during the preceding year to produce a fraction; (2) by determining the total fee required under the laws of each jurisdiction for full registration of each vehicle; and (3) by multiplying the total fee for each state by the fraction of in-jurisdiction miles to total miles applicable to that state.

103. For example, assuming a motor carrier vehicle based in Pennsylvania, state A or state B traveled 50% of its miles in the Commonwealth, 40% in state A, and 10% in state B, and assuming the full registration fees for those states were $400, $300, and $200 respectively,

the registration fees paid by that vehicle would be as follows (if states A and B are IRP-member jurisdictions—but see paragraph 104, below):

To Pennsylvania:	50% × $400 =	$200
To state A:	40% × $300 =	$120
To state B:	10 × $200 =	$ 20
Total registration fee:		$340

104. No state which is contiguous to Pennsylvania is a member of the IRP.

105. Any vehicle entering Pennsylvania necessarily travels through a state, or states, not belonging to the IRP. This travel will be referred to as "non-IRP miles".

106. Non-IRP miles and miles travelled in Pennsylvania are included in the total number of miles forming the basis of the registration fee paid to the Commonwealth by Pennsylvania-based apportioned-registered vehicles.

107. That is, a Pennsylvania-based apportioned-registered vehicle pays the Commonwealth a registration fee determined according to the following formula:

$$\text{PA. registration fee} \times \frac{\text{(total PA. miles + total non-IRP miles)}}{\text{miles travelled everywhere}}$$

108. Registration fees paid to Pennsylvania by apportioned-registered vehicles based in states other than Pennsylvania are based only on the proportion of total miles those vehicles travel in Pennsylvania.

109. By application of the principles set out in paragraphs 104-108, apportioned-registered vehicles based in IRP states other than Pennsylvania normally pay less to Pennsylvania in combined registration and marker fees than do apportioned registered vehicles based in Pennsylvania. This assumes that both classes of vehicles travel the same proportion of their total miles inside and outside of Pennsylvania.

110. The general theory underlying apportioned registration is that the same registration fees will be paid by a motor carrier vehicle based in any of the participating states to the states in which it has traveled so long as that vehicle has traveled the same proportion of miles in each state.

111. The $25 marker fee is a road-use privilege tax, not a "registration" fee subject to apportionment under the IRP. See Article III B, IRP.

112. For this reason, apportioned-registration vehicles pay the full $25 marker fee, rather than an apportioned amount of that fee based upon the proportion of miles travelled in Pennsylvania. This paragraph assumes refunds have been made to motor carriers who paid an apportioned amount of the fee. (See paragraphs 123-126.)

113. Vehicles based in states with which Pennsylvania has entered non-apportioned (full) reciprocity agreements likewise pay the full $25 marker fee.

* * * *

VII. *Transfer Of Vehicle Registration And Payment of The Marker Fee*

147. When a carrier based in a jurisdiction other than Pennsylvania transfers a vehicle registration from one vehicle to a replacement vehicle, the carrier must pay the Department of Revenue a $25.00 fee to secure another marker to be displayed on the replacement vehicle. Fuel tax markers and the associated fees required for vehicles based in jurisdictions other than Pennsylvania are not transferable.

148. When a carrier based in Pennsylvania transfers a Pennsylvania vehicle registration from one vehicle to a replacement vehicle, the carrier accomplishes the transfer pursuant to 75 Pa.C.S. § 1314. This carrier is not required to pay a second $25.00 marker fee. Deemed fuel

tax marker fees for Pennsylvania-based vehicles are transferable.

VIII. *The Marker Fee Is A Flat Tax; Total Highway User Tax Revenues And Fees Vary With Mileage and Other Factors*

149. Registration fees charged Pennsylvania-based vehicles vary with the weight of the vehicle.

150. Pennsylvania apportioned registration fees charged vehicles based in IRP-member states vary with vehicle weight.

151. Apportioned registration fees also vary with the proportion of miles travelled in Pennsylvania.

152. Permit fees charged for the hauling of overweight loads vary with the number of tons of excess weight hauled.

153. The Fuels Use Tax and the Liquid Fuels Tax are per-gallon taxes on, *inter alia*, diesel fuel and gasoline, respectively, whose total in relation to a given vehicle will vary with the number of gallons consumed, and therefore the number of miles travelled, in Pennsylvania.

154. Likewise, the Motor Carriers Road Tax and the Oil Company Franchise Tax are per-gallon taxes on liquid fuels whose totals vary, for a given vehicle, with the number of gallons consumed, and therefore, the number of miles travelled, in Pennsylvania.

155. The Gross Receipts Tax varies with the proportion of miles travelled in Pennsylvania and with the gross receipts of the carrier.

156. The $25.00 marker fee is a tax of fixed amount imposed on motor carrier vehicles for the privilege of using Pennsylvania highways, regardless of the extent of use.

157. Total taxes and fees charged a motor carrier for the use of the highways vary with number or proportion of fleet miles travelled in Pennsylvania, the weight of the vehicle operated, and the gross receipts of the carrier.

IX. *Non-Apportioned Reciprocity Agreements*

158. Registration fees paid Pennsylvania by Pennsylvania-based carriers secure for the registrant the privilege of operating the registered vehicle during the registration period over the highways of Pennsylvania and all other states with which Pennsylvania has registration reciprocity respecting that vehicle registration. The cost of such registration is attributable to operations in Pennsylvania and in other states under such reciprocity.

159. Registration fees paid by vehicles based in states with which Pennsylvania has entered non-apportioned reciprocity agreements secure for the registrant the privilege of operating the registered vehicle on the home state's roads and the roads of all other states, including Pennsylvania, with which the home state has registration reciprocity. Vehicles so registered pay no registration fee to Pennsylvania.

160. The average motor carrier vehicle operating at 80,000 pounds gross vehicle weight experiences fuel consumption of 4.9 miles per gallon. The average motor carrier vehicle operating at 60,000 pounds gross vehicle weight experiences fuel consumption of 5.3 miles per gallon. The average motor carrier vehicle operating at 40,000 pounds gross vehicle weight experiences 5.9 miles per gallon. The average motor carrier vehicle operating at 20,000 pounds gross vehicle weight experiences fuel consumption of 6.6 miles per gallon.

X. *Trip Permits*

161. Trip permits issued pursuant to Section 2101 (d) (2) are valid for the 5-day period shown on the per-

mit and for the motor carrier vehicle identified in the permit. Trip permits are issued upon the payment of a $5.00 fee to the Commonwealth.

162. During calendar year 1982, Department of Revenue agents sold approximately 3,262 temporary trip permits to drivers of vehicles subject to the marker fee who were, at the time of sale, driving, on Pennsylvania roads, non-Pennsylvania-registered vehicles for which neither marker decals nor trip permits had been obtained.

163. Trip permits may be secured by mail from the Department of Revenue. Fewer than one percent of the trip permits issued are secured in this fashion because motor carriers: a) sometimes do not have adequate advance notice of the need for a trip permit to allow them to order permits by mail; and b) where they do have such advance notice, the carrier sometimes has not decided which vehicle will be dispatched for the designated movement.

164. Over 99 percent of the trip permits used by motor carriers are secured through the several permit services which the Department of Revenue allows to transmit trip permits. The permit services: a) accept orders for trip permits by telephone; b) issue the trip permit to the motor carrier; and c) transmit the permit by wire to the locations designated by the ordering motor carrier. There are several thousand receiving locations. These locations include: 1) permit service offices; 2) carrier offices or terminals; and 3) truck stops. The permit service pays the Department of Revenue the required fee for each permit it issues.

165. The Commonwealth realizes $5.00 in revenue for each trip permit issued.

166. The motor carrier experiences a cost ranging from $10.50 to $18.00 per trip permit. This cost includes the $5.00 permit fee and the permit service fee. The total permit cost is dependent on the selection of the permit

service, the location to which the permit is to be transmitted and the gross volume of business tendered by the motor carrier to the permit service.

/s/ Arthur R. Littleton
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[TESTIMONY OF MR. PHILLIPS]

* * * *

[4] MR. PHILLIPS: Being duly sworn according to law, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LITTLETON:

Q Mr. Philips, by whom are you employed, sir?
A Department of Transportation.
Q Pennsylvania Department, and in what capacity?
A Traffic Planning Specialist.
Q And, at our request and subject to a subpoena have you examined the 1979 total vehicle miles traveled in Pennsylvania by a number of category of vehicles?
A That is correct.
Q And, have you prepared an exhibit showing your conclusions?
A Yes.

* * * *

[5] BY MR. LITTLETON:

Q You have a copy of this exhibit in your hand?
A Yes.

(Whereupon, petitioners' exhibit #1, 1979 annual [6] vehicle miles dated June 16, 1983, was presented and marked for identification.)

BY MR. LITTLETON:

Q By the way it depicts 1979, is that the last year that statistics are available?
A That's the last year that a total tabulation was made of the vehicle miles travelled in Pennsylvania by category.
Q Could you explain the front page of that exhibit to his Honor, please?

A Yes, sir. They put—again 1979 was the last year that we had a detailed tabulation of the vehicle miles of travel in Pennsylvania by category of vehicle. So, we combined that knowledge with the data that was gained by the Census of Transportation that is operated by the federal government. We combined those two studies into this exhibit in order to try to determine—to answer the question how much travel is done by out of state vehicles in Pennsylvania. And, of course, the front page there is a—is the end result and the accompanying pages are the documentation for that.

Q I direct your attention to the end result. You have divided the left hand column into single units and combinations. Would you explain briefly what the single units are and what a combination is and how you broke it down?

A Of course, the trucks—they are truck types we are talking about. And, the single units we are divided up to [7] three major types of trucks. The single unit, two axle, four tire that is where the rear tires of the vehicle is just a single tire. It is two 6 inch tires. As you go up in weight. They are required to use dual rear tires. So, the next stratification of trucks becomes a two axle 6 tire. In planning this is referred to as truck, that would be a vehicle which has six tires, as opposed to four tires, becomes a truck. That is the second stratification, two axle six tires. And, the third, of course, is the three axle vehicle, and this is the major category and it includes three axle, four axle, and any odd construction axles that might be on a single unit vehicle. That is the first stratification of trucks. The second stratification is the combinations and those are the tractor-trailer, primarily, that you see on the highway. And they—we have stratified those, primarily, by three axles—that would be a total of three axles on the entire vehicle, a four axle vehicle and a five vehicle which is the predominate vehicle on the highway in terms of combinations.

* * * *

[10] CROSS EXAMINATION

BY MR. HOFFMAN:

Q Mr. Phillips, the sample you said that these numbers were derived from a sample of, I think, 2,800 trucks, is that right?

A Yes.

Q Now, do the miles that are reflected on the front page of the exhibit related to those sampled 2,800 or to all trucks?

A To all trucks. That was strictly a random sample, and used to represent the population.

[11] Q What would be the total number of trucks in the universe of which the 2,800 is a sample?

A It is approximately 1,000,000 Pennsylvania registered trucks. It's something less than that but it is approximately 1,000,000.

Q And, do you have a view as to the accuracy of, or the degree of accuracy of the numbers and percentages that are reflected on the cover sheet?

A Yes, sir. As planning statistics go they are very weak, but I doubt that they could be improved on at all. There is not that much data available.

Q When you say that they are weak, let's take a number and say the four axle, under combinations for which the out of state is listed at 32%, and I guess the in state would be 68%, right?

A Yes, sir.

Q How accurate are those numbers likely to be?

A I would say they would be incrementally accurate. That would be reflected by the study, Census of Transportation, that incremented it in terms of 25 percent. I would say that it would be reasonable to assume that to be correct, plus or minus 25% If I might add something that statistically these figures defy any quantified accuracy, or quantifying the accuracy by standard statistical methods.

MR. HOFFMAN: That's all, thank you very much.

[12] REDIRECT EXAMINATION

BY MR. LITTLETON:

Q These are Department of Transportation figures which they, the Departemnt, uses for planning purposes and all their aspects?

A They were in 1979, yes, sir.

Q And, the Department of Transportation relies upon these figures in their planning?

A Yes, sir, they have.

Q As the best possible figures they could possibly get?

A Yes, sir.

* * * *

[TESTIMONY OF EUGENE ANGLIN]

MR. NAPOLITANO: We'd like to call Eugene Anglin.

EUGENE ANGLIN: Being duly sworn according to law, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NAPOLITANO:

[13] Q Mr. Anglin, would you state your name for the record.

A Eugene J. Anglin.

Q And, what is your current address, Mr. Anglin?

A 306 Havenwood Drive—

MR. HOFFMAN: Your Honor, may I just ask the witness to keep his voice up. I have a little hearing problem and I have a little trouble over here.

THE WITNESS: 306 Havenwood Drive, Archdale, North Carolina.

BY MR. NAPOLITANO:

Q Are you employed, Mr. Anglin?

A Yes.

Q By whom?

A Old Dominion Freight Line.

Q And, where is your office located?

A High Point, North Carolina.

Q Mr. Anglin, what is your position with Old Dominion?

A Director of Transportation.

Q How long have you been the Director of Transportation?

A Three and a half years.

Q How long have you been with Old Dominion?

A Ten years.

Q Were you involved in the trucking industry before you joined Old Dominion?

[14] A Since July of 1953.

Q Mr. Anglin, are you knowledgeable concerning Old Dominion and its divisions and their practices with respect to qualification of motor carrier vehicles?

A Yes.

Q Would you tell me a little bit about the structure of Old Dominion and its divisions, please?

A Old Dominion is a common carrier with general commodity authority. The Old Dominion division is the "LTL" division, less than truckload shipments. The division operates Barnes Truck Lines which is a truckload hauler.

Q Does Old Dominion operate any other divisions?

A Rapid Transport which is the same as Barnes, and the both divisions operate over the same general areas that Old Dominion's "LTL" division operates over.

Q You mentioned that Old Dominion has an "LTL" or less than truckload carrier. What do you mean by that?

A Old Dominion handles shipments from five pounds to 48,000 pounds. We pick up any type of general commodity and transport it from point to point.

Q And, what would the principle routes operated by Old Dominion be?

A From the east to the south, and between the east and the south, and the southwest.

Q Primarily the eastern portion of the country?

[15] A The Mississippi eastward.

Q Do you have any knowledge as to the approximate gross revenue of Old Dominion in 1981?

A Old Dominion's approximate revenue is $92,000,000.

Q Gross revenue?

A Yes.

Q And, you also mentioned Barnes division, you said they were a truckload hauler. Would you explain what a truckload hauler is, please?

A A truckload hauler moves one, primarily one single shipment from one shipper to one consignee.

Q And, what are the principal routes operated by the Barnes division, if any?

A The same area basically that Old Dominion operates.

Q Do you have any knowledge of the approximate gross revenue of the Barnes division?

A Eighteen Million Dollars.

Q That's in 1981?

A Right.

Q You also mentioned the Rapid division, you said they were also a truckload carrier?

A Yes.

Q Do you—would you tell us the principal routes of the Rapid division?

A The Rapid division operates over the same principal [16] routes as Old Dominion and Barnes operate.

Q So all three, Old Dominion, Rapid and Barnes operate in the east coast of the United States?

A Yes, primarily.

Q Are you familiar with the term owner-operator?

A Yes.

Q Would you explain to the Court what an owner-operator is?

A To the best of my ability an owner-operator is a person that owns his own tractor and leases this tractor to a company to move freight for the said company.

Q And, do Old Dominion, Barnes or Rapid utilize any owner-operators in their operations?

A Barnes does. Rapid is entirely owner-operators, and Old Dominion does some.

Q Including these owner-operator vehicles, could you tell me approximately the number—or exactly the number of motor carrier vehicles operated by Old Dominion, Barnes, and Rapid as a group in 1981?

A Eight hundred and fourteen.

Q Would you happen to know what the number of motor carrier vehicles operated in 1982 was?

A Approximately the same.

Q Do Old Dominion, Rapid and Barnes purchase marker decals for these motor carrier vehicles?

[17] A Yes.

Q Including owner-operator vehicles?

A Yes.

Q Do you know the number of Pennsylvania marker decals purchased in 1981 by the three companies combined?

A One thousand and forty-five.

Q Do you know the number for 1982?

A Nine hundred and ninety-five.

Q Mr. Anglin, you testified that you purchased 995 and 1,045 in 1982 and 1981 respectively, and that is more than the number of trucks that you testified the three companies combined operated during that period which you said was about 814. Could you explain why you purchased more decals?

A Because of the turnover in the owner-operator divisions. A driver may lease to Old Dominion and stay for a period of 90 days or less, or half of the year, and he will leave for various reasons. And, when we replace this driver we must buy another permit.

Q Excuse me?

A The permit is not transferable.

Q So what happens to the permit you purchased and put on an owner-operated vehicle if the owner-operator leaves?

A It should be destroyed. It is no longer valid, or cannot be used because it's in the name of Old Dominion.

Q Then you purchase another decal for the new truck?

[18] A Yes.

Q Is there any way you can define approximately what percentage of your trucks turn over in the course of a year?

MR. HOFFMAN: I'm sorry. I couldn't hear the question.

BY MR. NAPOLITANO:

Q Is there any way that you can estimate or define the number of trucks that would turn over in the company within a year?

A The owner-operator approximately 20%.

Q And, how about the company as a whole?

A About 12%, probably.

Q Mr. Anglin, do you have any knowledge as to how many motor carrier vehicles operated by Old Dominion, Barnes and Rapid were qualified to operate in Pennsylvania in 1981 and 1982?

A All vehicles were.

Q You say all of the motor carrier vehicles operated by the three companies were qualified in Pennsylvania?

A All the over the road vehicles, yes.

Q Well, you said over the road vehicles as opposed to what?

A Local units that would pick up and deliver only in one city. All of the over the road vehicles were.

Q Why do you qualify all of your over the road vehicles?

A In the truckload division with Barnes and Rapid the [19] drivers must be permitted or qualified to go any where within our general operating authority. They may leave New York and go to Chicago, come back to Philadelphia, and then to Florida, New Orleans and then back. They must be permitted to go—to be allowed to go any where in our system.

Q Mr. Anglin, do you maintain records of mileage on a truck by truck basis for Old Dominion, Barnes or Rapid?

A No.

Q Do you have any knowledge of approximately the aggregate or exactly the aggregate number of miles traveled in Pennsylvania by Old Dominion, Barnes and Rapid's vehicles in 1981?

A 2,216,000.

* * * *

[CROSS EXAMINATION]

[20] Q And, you don't have any problem do you because of the markers that require you to revise your routings around Pennsylvania or such things?

A We didn't in 1981.

* * * *

[23] REDIRECT EXAMINATION

BY MR. NAPOLITANO:

Q Mr. Anglin, why don't you purchase decals when—why don't you purchase decals when you need them and as you need them? Why do you purchase them in advance as you just testified?

A The expense to purchase the decal when you need it—would be on the road would be approximately 100% higher. A decal that costs $25 to purchase that decal when you start into Pennsylvania through an agency or some type of a system, that way would cost approximately $50.

Q Why is that? What's the mechanism that costs the extra money?

A The communication and the forwarding the money and the billing and the so forth to someone that would sell that decal, someone that does that type of business.

Q And, does that slow you down at all?

A Yes.

[24] MR. NAPOLITANO: No further questions.

MR. HOFFMAN: Just a few more, I'm sorry, in response to those.

RECROSS EXAMINATION

BY MR. HOFFMAN:

Q Just to amplify that, there are companies whose business is to sell marker decals or to arrange for you to get marker decals?

A Yes.

Q And, you can get those, and they charge a fee for doing that?

A Yes.

Q And, the alternative to that is you get them from the Revenue Department directly?

A Yes.

Q And, there is also such a thing known as a trip permit, right?

A Yes.

Q And, that rather than a marker which allows you to operate in the state for the course of the year, that is limited to a shorter time period?

A Yes.

Q And, that's available also, is it not, from the Revenue Department or from a permit business?

A Yes.

[25] Q And, if you get it from a permit business you pay a surcharge?

A Yes.

MR. HOFFMAN: That's all, thank you.

[TESTIMONY OF VERA GARNER]

MR. NAPOLITANO: I'd like to call Ms. Vera Garner.

VERA GARNER: Being duly sworn according to law, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NAPOLITANO:

Q Would you state your name for the record, please.
A I'm Vera Garner.
Q And, what is your address, Ms. Garner?
A 9305 Holdsberry Road, Pensacola, Florida.
Q And, are you employed, Ms. Garner?
A Yes, sir.
Q By whom?
A Leonard Brothers Trucking Company, Incorporated.
Q And, where is Leonard Brothers headquartered?
A The corporate office is Miami, Florida.
Q And, your office is in Pensacola?
A Pensacola.
Q What is your position?
A Legalization Supervisor.
Q What are your duties as Legalization Supervisor?
A To secure and permit all trucks in the state that [26] we have authority in and haul freight.
Q How long have you been in that position at Leonard Brothers?
A Since 1976.
Q And, how long have you been with Leonard Brothers?
A Since 1967, March.
Q Are you knowledgeable as to qualification procedures and practices of Leonard?
A Yes, sir, in relation to my job, yes.
Q And, your job is to qualify—
A The trucks.

Q Are you also knowledgeable as to the type of service provided by Leonard Brothers?

A Yes, sir.

Q And, what would that be?

A Interstate movement, long haul, heavy haulers.

Q And, what do you mean by heavy haulers?

A That means that they haul any freight that is controlled by size and weight. They have a minimum between 751,000 pounds. Everything must be loaded by forklift or by a crane.

Q How does this tend to operate? How do—what are your pick up and deliveries? How does that work?

A Point to point, wherever the customer happens to be, sir.

[27] Q So, you go to a place and pick up and deliver to another point?

A That is correct. We don't have a set pattern, no direct runs and this type of thing.

Q What part of the country do you primarily operate in?

A Pretty much in the 48.

* * * *

[28] Q Do you have any knowledge of the number of vehicles operated in 1982 by Leonard Brothers?

A Yes, sir, we had 225 over the road units.

Q Approximately how many at that time did Leonard Brothers operate as owners?

A The same, 80.

Q About 80. Ms. Garner, you said you are in charge of purchasing the decals, did you?

A That is correct.

[29] Q Did Leonard Brothers purchase decals for all of the trucks which it operated, all the motor carrier vehicles, which it operated over the road in 1981 and '82?

A Yes, sir, we did.

Q Do you know the approximate number of decals purchased in each of those years?

A In 1981, 225; in 1982, 275.

Q You testified that in 1981, 225 marker decals were purchased and in 1982, 275. In each case that exceeds the number of trucks that you were operating in that year. Why is that?

A To allow for vehicles coming on and additional turn over. We are also constantly leasing new equipment.

Q So that, once again, when a truck—explain what you mean a little bit clearer?

A When we put a truck on we issue a decal to that truck for the states that they are going to travel, okay, or order for that truck. When that truck leaves, if it is there three months, those decals have to be removed and defaced, and additional decals have to go on. And, so the balance of the decals, the additional order is as a stock item that we have the convenience which the state allows us to do, to legalize that truck, say in Pennsylvania for example, without having to wait for the mail to come. It is a stock item, more or less.

Q In order to do that you purchase a larger number than you know you will need in advance?

[30] A We kind of anticipate what we feel we will need, and at the end of the year so far carrying over, you know.

Q I guess what I meant was you purchase more than the number of trucks you currently have?

A That's correct.

Q During the years 1981 and '82, do you know what percentage of the over the road fleet Leonard Brothers qualified in all 48 states?

A Their over the roads 100%.

Q Why does Leonard Brothers qualify all of its vehicles?

A We have to have the trucks ready to go with the freight, you know, where it takes it to. We have no way of knowing where the freight is going to go until a customer calls. So, we have to have the trucks legalized and ready to go.

Q Ms. Garner, does Leonard Brothers keep a record of truck mileage in each state on a truck by truck basis?

A Yes, sir, we do.

Q Do you happen to know how many of the 225 decals, and therefore trucks, that you purchased in 1981 traveled in Pennsylvania in that year?

A Yes, sir, 199. When the quarter ended in December 1981, 199 over the road units had actually traveled, had miles in that state.

Q Out of the 225 decals that were eventually put on trucks?

[31] A That's ending December 1981, yes, sir.

Q How about in 1982. Do you have any idea of how many of the 275 decals that you purchased were put on trucks that eventually travelled in Pennsylvania?

A Yes, sir, 225.

Q Shifting for a moment to aggregate miles, do you have any knowledge as to the aggregate number of miles for all of your trucks that were operated in Pennsylvania in 1981?

A Just in Pennsylvania, yes, in 1981, 166,280 miles.

Q And, do you know how many miles Leonard Brothers operated everywhere?

A Yes, sir, 12,681,890 miles.

Q How about 1982, do you have any knowledge of that?

A Yes, sir, in the state of Pennsylvania 154,573 miles, and everywhere, 16,521,698 miles.

* * * *

[33] BY MR. NAPOLITANO:

Q Ms. Garner, do you happen to have the cost of the marker decals purchased by Leonard Brothers in 1981?

A The total costs?

Q The total costs.

A $5,625.00.

Q. So, the cost of the decals was $5,625.00, and if our addition is correct your total fuel tax liability was $6,585.00 for 1981?

A That's correct.

Q Ms. Garner, why don't you purchase marker decal fees as you need them?

A Well because when we put a truck on, which we do, weekly we are adding to the fleet, and the state gives us the option, it's just far more convenient to have them available to put on that truck and sign the decal. It saves the temporary permit and the cost which exceeds the costs of the decal.

Q Would you be able to provide the same sort of service timewise to your customers if you didn't stockpile these decals?

A No, sir.

Q Why is that?

A Because a temporary permit is only good for the [34] five day traveling time which many times will not allow a truck the travel time. And, a temporary permit, like I say, exceeds the cost of the original decal. And, so we feel that's—and in the course of a calendar year going from April to April we really have no decals left over because our mileage is based on January to December; but, our decals are purchased and anticipated from April to April. So, whereby our mileage runs out December '81, the decals carry over January, February and March, and the first part of April. We are putting on new trucks which will have to have the 1981 decal, and then April 1st we have to secure for them a 1982 decal, and that usually depletes our stock.

Q So, what you are saying just practically it doesn't work out for you the other way?

A That's right.

* * * *

[TESTIMONY OF DOUGLAS HUGHES]

[42] DOUGLAS HUGHES: Being duly sworn according to law, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LITTLETON:

Q Mr. Hughes, could you give us your name, please.

A Douglas A. Hughes.

Q And, by whom are you employed?

A The American Trucking Association.

Q And, in what capacity are you employed by that association?

A I am Director of its Department of State Laws.

Q And, could you tell His Honor what the American Trucking Association is, very briefly?

A ATA is a national federation of the trucking industry, having an affiliated association in each of the 50 states, and the District of Columbia, and also having affiliation with the 13 national conferences.

* * * *

[44] Q And, in the past three years what have you been primarily doing?

A In the past three years we devoted a great deal of our attention to litigating various issues that have come up in the states not unlike the litigations before us here this afternoon. We have been involved in these kinds of fee cases in Connecticut, Kentucky, Maryland, here and Vermont, and with other issues affecting interstate truck operations in Mississippi, New York and Arkansas.

Q Now, in connection with this case, at our request and the request of the ATA, did you undertake to con-

duct a survey of Pennsylvania and non-Pennsylvania regtered vehicles?

A Yes, sir, we did.

Q Could you describe how you went about that survey, and what information you gathered?

A The first thing that we had to do was identify those motor carriers who have obligations under this requirement, and in doing so we sought some rather specific [45] information under discovery from the Commonwealth of Pennsylvania.

Q Let me show you what will be marked exhibit P 2.

(Whereupon, petitioners' exhibit 2, a letter dated March 16, 1982, was presented and marked for identification.)

BY MR. LITTLETON:

Q Would you explain to His Honor what P 2 is? How you came to get it?

A We had asked the Commonwealth for a list of all of the motor carriers who are subject to the marker fee requirements, and also a list of all registrants of Pennsylvania motor carrier vehicles. And, we had asked some additional information of the Commonwealth which is responded to in this letter from Andrew Gordon which arrived in my office in mid-March 1982 along with two reels of computer tape which were the lists of these various carriers.

Q What did you do with those lists? What did you do with the tapes, really?

A Well, the tapes were put on the computer and a list was generated, survey forms were sent out to all of those carriers soliciting specific information with respect to the issues before the Court today.

(Whereupon, petitioners' exhibits 3, and 4, a memorandum dated March 24, 1982, and a memorandum dated March 24, 1982, were presented and marked for identification.)

[46] BY MR. LITTLETON:

Q Looking at exhibits P 3 and P 4, would you tell His Honor what they are?

A Yes. P 3 is the survey form which we sent to that list of carriers who had purchased fuel tax markers in 1981 up until early March 1982. They were located as might be expected at points outside of Pennsylvania. The list also indicated not only the names and addresses of these carriers, and in this group there were over 31,000 such carriers, but it also indicated the number of markers which had been purchased by those carriers.

Q And, who designed the questionnaire that is attached to each one of the letters going to them?

A I did.

Q What was the purpose of this survey, briefly stated?

A The basic purpose of the survey was to identify how this fee impacts on the individual motor carrier who uses Pennsylvania highways. On the one hand carrier vehicles which are registered in jurisdictions other than the Commonwealth and, secondly, how the fee, if in fact it is paid by carriers based in Pennsylvania, how that deemed cost affects them.

Q And, how many people or trucking companies did you send P 3 to?

A P 3 was sent to 31,358. P 4 went to the registrants of motor carrier vehicles in Pennsylvania, and that list [47] included 21,806 carriers. There was a total mailing of over 53,000.

Q Had you done similar surveys like this before?

A Oh, yes. We had done some earlier in Vermont and we had done one in Maine, and we have done some since this was conducted.

Q And, these were for cases involving Maine and Vermont—

A Very similar to the issues presented here, yes.

Q And, how many receipts did you get, take P 3 first.

A P 3 is the foreign based purchasers of decals. That went to 31,000. We had a response of 6,428, 59 of which were not useable and the rest are contained in exhibits which will be presented to the Court later.

Q What generally made the 59 unuseable?

A Oh, there were a number of causes. Some of them came in late. We had closed out the survey. Some of them were no longer in business or operating vehicles anywhere. Some were incomplete and we could not get in touch with them to gain a better insight. And, there were other reasons.

Q That about what; 20% return on those?

A Approximately about 20% yes.

Q And, the Pennsylvania based survey how many responses did you get on that?

A P 4 there were 6,423 responses. I'm sorry, for the [48] Pennsylvania based there were 1,690 responses, 151 of which were not useable. And, there was another group that was not useable solely because they operated totally intrastate.

Q Within Pennsylvania?

A Yes.

Q How many did you actually use, 1,539?

A No. In the final exhibit we included 953, but that —the carriers in the survey exhibit which will be presented shortly, operated interstate.

Q After you got all of these, or as you got all of these answers coming in, what did you do with them and how did your people handle them, and how did you insure their integrity?

A The first step was a clerical step. A computer code number was indicated on the corner for entry purposes into the computer. If they were foreign based carriers we also indicated the number of decals which the Commonwealth records reflected the carrier had purchased. I examined each one and segregated them. I either authorized them for entry into the computer or I set them aside for further inquiry by way of telephone interview

because I had questions, I had doubts as to the same aspect of the information which was recorded on the sheet. And, the third group, of course, were those which, perhaps after telephone inquiry we had decided not to use for one or several reasons.

MR. HOFFMAN: I can't hear.

[49] BY MR. LITTLETON:

Q Keep it strong.

A Yes.

Q And, after you—did you make telephone inquiries?

A Yes. We made about 1600 telephone interviews to gain insight into the information that was supplied to us just by the survey form, and so that I could gain confidence in understanding and be assured that what I was putting in the survey reports, in fact, reflected the operation.

Q Now, eventually those with which you were satisfied ultimately got into the computer?

A Yes, they did. In several cases directly after they had been received, and in some cases not until after they had been reviewd.

Q And your computer coughed up quite a lot of statistics and information?

A Yes.

Q I show you what will be marked exhibit P 5.

(Whereupon, petitioners' exhibit 5, survey of Pennsylvania Foreign-Based Vehicle Registrants Highway Use Operating Characteristics 1981, was presented and marked for identification.)

BY MR. LITTLETON:

Q And, would you explain to His Honor what P 5 is?

A P 5 is a summary report embracing some 5,901 carriers who operate vehicles in Pennsylvania which are base [50] registered in states other than Pennsylvania.

As you can see from the summary page in 1981 they had purchased—

MR. HOFFMAN: Excuse me, your Honor. At this stage, just as Mr. Hughes begins to get into the substance of his questionnaire and its results I think we have two serious objections that go to this survey report and all the other survey reports that will follow, and if I may—

THE COURT: Do you want to make an objection?

MR. HOFFMAN: Yes, I do. I think it is the right juncture. I waited while he described the process and when he got to the substance I think this is the time, Judge, if I may. We have two problems for two separate reasons. I think as Mr. Hughes has described what you have is a compilation of information that was returned to them on data sheets, supplemented by telephone conversations. Now, in both instances you have different forms of hearsay, but in both instances that's hearsay. That's out of court assertions that are being accumulated, put on to a computer printout, and accumulated into conclusions that are set forth on the front page of that exhibit. Now, the question that becomes is there some exception to the hearsay rule that allows that type of survey material to be admitted into evidence. Interestingly we weren't able to find any Pennsylvania case law that really describes the matter at all, and the best thing we found is a Third Circuit case from 1978. And, I wonder whether I could hand that up to the Court. It is [51] the Pittsburgh Press Club versus the United States. I give a copy to Mr. Littleton. That's at 579 F. 2d 751, your Honor. Now, what that case says in dealing with the issue of the federal rules, I think the relevant sections, your Honor, are about 757 and on, but what the court concluded there was that a report like a survey is admissible in federal court under what they call the catch-all exception to the hearsay rule. That is rule 803 of the federal rules, and I am referring to page 758, if it is done in accordance with professional standards.

Now, there will be some testimony later that that may not be the case here, that it wasn't done in accordance with those standards. But, the point for today is that to my knowledge the catch-all exception in the federal courts, which is to say, does it look reliable and is it important, and it doesn't fit under any other exception maybe we can let it in, isn't part of Pennsylvania law. So, I have a lot of trouble understanding how the survey results are admissible in court. So, we have that problem, Judge. Secondly, I know I referred in my opening statement to the fact that the theory on which this survey is predicated which is that the cost per mile of Pennsylvania based carriers is less than the cost per mile of out of state registrants, that is to say a differential impact was expressly rejected by the United States Supreme Court in three cases that are cited on page 11 of our brief, and I'm not going to read extensively. Let me just give you a sentence, [52] if I may, Judge. And, we have excerpted some of the quotations. These are all either recent cases or cases that have been reaffirmed over the years. And, they say, for example, in what is called the Aero-Mayflower cases, that the flat fee which was at issue in that case: "Is for the privilege for a use as extensive as the carrier wills that it shall be. There is nothing unreasonable or oppressive and a burden so imposed, one who receives a privilege without limit is not wronged by his own refusal to enjoy as freely as he may." And, in that case and in two other cases that we have cited, the Supreme Court has said that the fact that there is a flat fee; in this instance, $25, that some people may drive more miles in Pennsylvania and, therefore have a higher or a lower cost per mile, as the case may be, simply does not wash under the Complete Auto test. So, for both the reason that in our view it is simply irrelevant, and for the second reason that I think it is hearsay and I don't see an exception to permit it in, we would think that this area of the case is not one that is properly before the Court, your Honor.

THE COURT: Well, the Mayflower case was a question that it was assessed against all carriers. I think that's in dispute here.

MR. HOFFMAN: I agree, your Honor, that is in dispute here; but, that's the first prong of Mr. Littleton's argument. This survey goes to the second prong.

[53] THE COURT: Mr. Littleton is going to bear the burden of establishing that this is trustworthy enough for the Court to rely upon. It is certainly relevant and material, and certainly has a lot of probative value. But, in any event, we are going to overrule your objection at this time; however, if at the conclusion of Mr. Littleton's case you feel that he has not met his burden you certainly can make a motion to strike that testimony from the record.

MR. HOFFMAN: What I prefer to do, if I may, your Honor, I will need testimony from our witness as to why it does not meet professional standards and is not reliable. So, if I may, I would make a motion after we have presented our testimony to strike it or delete it from the record.

THE COURT: Very well.

MR. HOFFMAN: Thank you.

MR. LITTLETON: Thank you, your Honor.

BY MR. LITTLETON:

Q Going back to exhibit 5, and the survey, the summary sheet, could you explain to His Honor the important items on that summary sheet?

A The summary is a compilation of a sum, if you will, of the carriers in the survey. They had purchased a little over 169,000 markers in 1981.

Q Let me stop you right there. That information as to how many markers came to you from the tapes that the [54] Pennsylvania DOT forwarded to you?

A That information was on the tapes, and in some cases was incorrect as reflected by the carriers numbers,

and was confirmed with the carriers in telephone interviews and the corrected information is reflected here.

Q Would you say a great majority of that information is from the tapes itself?

A Well, the vast majority is, yes.

Q So, that's the information that the DOT gave you?

A Yes.

Q Go ahead.

A These carriers had purchased about 5,500 trip permits, a five day permit which were discussed earlier. They had traveled everywhere about 12½ billion miles in 1981, 766,000,000 of those miles were in Pennsylvania. And, they expressed—experienced marker costs of a shade over $4,000,000 and trip permit costs $27,500. And, their cost when spread over their Pennsylvania miles comes out to a little over ½ cent a mile, [0.56] of a cent per mile. The purpose of putting together P 5 was not necessarily to come to these aggregate numbers and averages, but to determine, as I said at the outset, what the impact is on individual carriers using the highways of Pennsylvania. And, I think to see the value of this exhibit you have to look at the carriers inside.

THE COURT: Is that the purpose of the exhibit?

[55] MR. LITTLETON: That's one of the purposes, not the sole purpose.

THE COURT: Very well.

BY MR. LITTLETON:

Q Looking at the—still the summary at the bottom where you have average costs .0056 per mile. That's the cost per mile that the survey shows of the 5,091 carriers?

A Yes, their vehicles and it is an average costs. There are many—some carriers below it and there are some carriers above it.

• • • •

[58] BY MR. LITTLETON:

Q Now, would you go to some of the—would you explain to His Honor, say take page 1, and explain what the interior documentation is.

A If we can look at page 1 in the survey it reports the total miles and the Pennsylvania miles as was reported by the carrier. And, perhaps, by way of example we can look [at] the fourth group from the top on page 1, A. Arnold and Sons which is a household goods carrier out of Louisville, Kentucky. Their total miles and their Pennsylvania miles are recorded. Further across the page the number of markers which they purchased, 27, is recorded. The two intervening columns are computer calculations of the percentage of their Pennsylvania miles to their miles everywhere. And, then the computer calculation of the average miles per truck in Pennsylvania, which does not necessarily reflect any one of their vehicles. It is an average for the 27. Their cost of decals is calculated by multiplying the 27 decals times $25, $675; and, then their cost per mile. In this case about 2½ cents a mile, is the $675 divided by the 26,764 miles in Pennsylvania, a cost factor, frankly, not uncommon among the 40 or 50 or 60 household goods carriers that are in this survey report.

Q The factors you need to come to the 2½ cents per mile cost are the Pennsylvania miles and the number of [59] markers that were purchased?

A That is correct.

Q And, you got the information about the number of markers in the most part from PennDOT?

A Yes.

Q And, is there a mechanism within the trucking industry where Pennsylvania does, in fact, have the Pennsylvania miles of A. Arnold and Sons somewhere recorded?

A All these mileage numbers for the carriers are provided on a quarterly basis to the Department of

Revenue in meeting the carrier's obligation under the road tax.

Q So if there was any question of how many miles A. Arnold ran in Pennsylvania, Pennsylvania could go and look at the filings made to pay the fuel tax, is that correct?

A Yes, they have all of these mileage numbers and, in fact, they have it for the entire population.

* * * *

[63] BY MR. LITTLETON:

Q I show you what is marked as P 7. Would you tell the Court what that represents?

A This is not unlike structurally the information presented in P 5, but the carriers listed in P 7 are all Pennsylvania based interstate carriers. These are the carriers who operate vehicles with Pennsylvania registration, and are deemed to have paid this marker fee evidentally as a part of their vehicle registration fee.

Q And, your calculation of the cost per mile for [64] these people are based on the fact that you assume that they did, in fact, pay $25?

A Assuming the $25 as a cost element, yes, that is the premise in this exhibit.

* * * *

Q Now, while we are on it, does the Pennsylvania miles shown for all of the carriers listed on P 7, is that filed with the Commonwealth by the carrier and separately and independently of this survey?

A I believe so.

Q And, it's filed, presumably, for the purpose of [65] figuring out what their fuel tax will be?

A Yes. There is an additional filing for carriers which are now apportioned, and that would be with the Department of Transportation for apportioned registration purposes.

Q Now, are there high and low costs per mile in this?

A As we found in P 5 it is the same kind of experience here. If we can look for a moment on page 16, we can find a low cost carrier in the top group, the fourth carrier from the top, in fact, Philadelphia Newspaper which are the publishers of the Philadelphia Inquirer, 91% of their miles are in Pennsylvania, and they have good equipment utilization. And, they have a low cost of [0.02] of a cent. But, again there are other kinds of carriers who for one reason or another do not have such high utilization. If we look on the second page of the exhibit in the second group from the bottom, Bearing Products Company, we find that they have a cost, and this is the highest cost carrier I believe in the survey, of some [25] cents per mile. Bearing Products uses their single vehicle in Philadelphia less than 10 days a year. There are some carriers who are not only represented in P 7, but who also appear in P 5, and this is because there are carriers who have some vehicles registered in Pennsylvania and some vehicles registered beyond Pennsylvania. In P 7, for example, if we look on page 20 we will find United Parcel Service listed, the tenth carrier from the top, and [66] their costs for these 480 Pennsylvania registered vehicles, assuming there is in fact any cost at all, calculates to be [0.06] of a cent, lower than the average. But, if you look at the company's vehicles registered beyond Pennsylvania, referring back to P 5, on page 122, it is the 15th carrier from the top, the end of that third group. There are 886 vehicles registered beyond Pennsylvania. They have a cost of [0.30] of a cent per mile. There are, in fact, some 95 such carriers which are in both exhibits because of the way they base and operate their interstate vehicles.

Q Now, were some of the responses—strike that. Go back to the summary page of P 7 if you will.

A Yes, sir.

Q Assuming and would you explain to His Honor what the results of the summary are and what they show as to the cost per mile?

A The 953 carriers operate 14,253 motor carrier vehicles registered in Pennsylvania. Their Pennsylvania mileage is 326,798,025 miles, and assuming that they have a marker cost at all at $25 per vehicle that cost would be $356,326. And, on a per mile cost basis that comes to [0.11] of a cent, one-fifth of the cost experience of the vehicles registered beyond Pennsylvania.

Q Which are in P 5?

A Yes.

[67] Q Were there some answers where you found completely totally intrastate vehicles?

A Yes. We received responses from some 586 purely intrastate carriers in Pennsylvania. They had registered some 2,644 Pennsylvania trucks, and operated those vehicles all in Pennsylvania, 56,592,193 miles. Interestingly, assuming they have a marker fee cost, that cost would be $66,100 which calculates out to [0.12] of a cent, just about the same as the [0.11] for the Pennsylvania based interstate operators.

Q Now, based on these surveys, particularly P 5 and P 7, it would appear that the average for Pennsylvania based is .0011 and the average for foreign based is .0056 per mile. Can you convert that for illustrative purposes what that would mean say if it were a fuel tax? How many cents per gallon would that relate to?

A Yes, but it will vary from vehicle to vehicle, depending upon the weight of the vehicle and its fuel consumption. If we think in terms of a smaller motor carrier vehicle, one perhaps at 20,000 pounds gross vehicle weight, it experiences fuel consumption of about 6.6 miles per gallon. And, if that average motor carrier vehicle of 20,000 pounds is based beyond Pennsylvania the [0.56] of a cent translates into a comparable 3.7 per gallon fuel tax. That's the same cost impact for the Pennsylvania based operator of a similar vehicle it is only seven-tenths of a cent per gallon. If you go to a [68] heavier vehicle, one at 80,000 pounds, you find a fuel consumption rate of 4.9 miles per gallon. And, here the cost impact

for the foreign based operator the equivalent of the [0.56] of a cent is the same impact that he would experience with an additional fuel tax of 2.7 cents per gallon. Whereas, the Pennsylvania based operator, assuming he has any cost at all, the [0.11] translates into a half of a cent per gallon.

* * * *

[76] BY MR. LITTLETON:

Q And, P 11 which is the chart. And, I direct your attention to P 10. Would you explain to His Honor what that represents?

A Yes. We attempted to group the carriers reflected in P 5, the foreign based carriers, and those listed in P 7, the Pennsylvania based carriers, into various cost per mile groups, going from under [0.1] of a cent per mile up to [3.0] cents per mile. And, the Pennsylvania based carriers are listed in and profiled on the left side of that page, and the foreign based on the other side. And, here you can begin to see the impact of this fee as it affects various, different types of carriers. Over half of the Pennsylvania based carriers are under two-tenths of a cent per mile as you can see at the bottom of the page, and yet almost 30% of the foreign based carriers are over 3 cents a mile. In fact, within that group of over 3 cents a mile there are 136 listed in P 5 who are over 50 cents a mile. The exhibit 10—excuse me, exhibit 11, is a computer generated graph of the numbers contained in exhibit 10. The columns which have the "hash-marks" in it represent the profile for the Pennsylvania based vehicles. And, as we saw in the data on #10, graphically #11 shows for the Pennsylvania based carriers a very low cost per mile for a vast majority of the carriers; whereas, for the foreign based carriers their cost is considerably higher by way of [77] profile with that large percentage, the 29.7%, experiencing a cost of over 3 cents a mile.

Q And, the Pennsylvania costs indicated in these two exhibits is only a deemed cost?

A If there be a cost at all.

Q If there is a cost at all?

A Yes, sir.

Q Now, you heard Mr. Phillips testify this morning is that correct?

A This afternoon.

Q This afternoon.

A Yes.

Q And, you heard him indicate the number of Pennsylvania miles run by the various categories of trucks, and the number of out of state miles, is that correct?

A Yes.

Q Would you look at P 1, which is his handwritten—

A Yes, I have P 1.

Q Would you look also at P 2, please.

A The letter addressed to Mr. Snyder from Andrew Gordon, yes.

Q Now, in P 2 does Mr. Gordon tell you how many decals were sold to out of state tractors?

A Yes. In his paragraph 3 there is an indication that for the year beginning April 1, 1981, the 1981 decal year, in [78] the aggregate the Commonwealth sold 399,240 decals for display on foreign vehicles. And, in paragraph 2, Mr. Gordon advises us that there were at that time 130,910 vehicles in excess of 17,000 pounds registered in the Commonwealth.

Q And, at a $25 deemed cost have you multiplied out how much is deemed to have been received from the 130,910 Pennsylvania based carriers?

A Yes, I have.

Q Would you read that into the record?

A It is $3,272,750 in deemed cost.

Q And, did you multiply the number of out of—foreign based decals that were sold by $25?

A The 399,240 decals sold for display on vehicles registered beyond Pennsylvania at an actual cash expense for the industry of $9,981,000.

Q Now, in preparation for Mr. Phillips' testimony did you prepare a potential exhibit which I will now ask be marked P 12.

A Yes, I did.

(Whereupon, petitioners' exhibit 12, All Pennsylvania Based Motor Carrier Vehicles, and All Foreign Based Motor Carrier Vehicles, was presented and marked for identification.)

BY MR. LITTLETON:

Q And, those figures recited are indicated there in type, is that correct?

[79] A Yes, sir. They are typed calculations from Mr. Gordon's correspondence, P 2.

Q Now, during the testimony of the prior witnesses, but after Mr. Phillips, did you have an opportunity to add up from P 1 the number of miles run by Pennsylvania registered vehicles of two axles and six tires, and heavier?

A Yes, sir, I did.

Q And, what was your total mileage?

A The total mileage for those five categories from P 1, is 3,385,000,000 miles.

Q And, on our exhibit which we are slowly but surely putting together, that entry should go right after total Pennsylvania miles in the first—

A In the group at the top, yes.

Q And, during the period of time while this case has been tried did you make the necessary division?

A Yes, sir, I did.

Q And, what was the total cost per mile from Mr. Phillips' figures and Mr. Gordon's numbers?

A The cost per mile based on that very different approach is [0.10] of a cent.

Q And, what was your survey?

A [0.11] of a cent.

Q Now, did you do the same calculation for out of state mileage from Mr. Phillips' P 1 as to how many miles the [80] involved vehicles over 17,000 pounds ran?

A Yes. Again, it's adding the comparable five figures from P 1, and that number which should be placed next to total Pennsylvania miles in the foreign carrier group. is 1,811,000,000 miles.

Q And, did you perform the necessary division?

A Yes, sir, I did.

Q And, what did it come out to as the cost per mile for foreign based motor vehicles?

A [0.55] of a cent.

Q Compared to?

A [0.56] of a cent.

Q Which was the survey?

A Yes.

Q In your experience in the industry would you anticipate that the traffic mileage pattern testified to by Mr. Phillips as of 1979, which was the last data available to him and upon which Pennsylvania DOT plans its activity, would be any different in 1981, or meaningfully different in 1981?

A Trucking operations are a reflection of the national economy, and there has been no material difference in the 1979 vis-a-vis 1981 economy. I would not expect a material difference.

* * * *

[CROSS EXAMINATION]

[83] Q And, you do not consider yourself, do you, sir, expert in either the area of statistic or survey research?

A That is correct, although experienced.

* * * *

[REDIRECT EXAMINATION]

[127] Q Now, overnight, Mr. Hughes, we sat down and prepared another exhibit. Let me ask that that potential exhibit be marked P 13.

(Whereupon, petitioners' exhibit 13, Foreign based carriers which purchased 1000 or more marker decals, was presented and marked for identification.)

BY MR. LITTLETON:

Q And, could you explain to the Court what that exhibit is, and the manner in which it is set up?

A Yes. This is a listing of the larger carriers in P 5 measured in terms of the numbers of decals which they purchased, and, in fact, the threshhold used is 1,000 decals. All carriers listed in P 5 which paid taxes for 1,000 or more decals are in this list here.

[128] Q And, did you check the Pennsylvania DOT tapes to determine how many of the Pennsylvania listing had purchased more than 1,000?

A There were 40 carriers who purchased 1,000 or more decals from Pennsylvania in this year.

Q According to the Pennsylvania computer tapes?

A Yes.

Q How many of those 40 responded and are on this list?

A Twenty-one.

Q And, what's the total Pennsylvania miles of the 21 carriers who responded?

A 203,796,806 miles, as shown in the second column of this exhibit.

Q And the total costs of those permits and markers?

A $1,174,335 as shown in the third column of the exhibit.

Q And, if you were to find an average cost per mile of those two items what would you get?

A [0.58] of a cent.

Q And, what percentage of the tal foreign based Pennsylvania miles which are on the front piece of P 5, do the 203,796,000 mile represent?

A 26.5%.

* * * *

[129] MR. LITTLETON: We have no further witnesses, your Honor. And, we would respectfully move the admission of the exhibits.

THE COURT: Any objections?

MR. HOFFMAN: Your Honor, our objections are limited to the surveys for the reasons we stated yesterday relating to relevancy and hearsay.

THE COURT: Objections overruled, and the exhibits will [130] be received in evidence and made part of the record.

* * * *

[TESTIMONY OF WALTER KILARESKI]

[CROSS EXAMINATION]

[167] Q You can't say that trucks registered in another state coming through Pennsylvania do more damage to the highways than a truck in Pennsylvania, registered in Pennsylvania?

A Are they the same axle load?

Q Same axle load.

A Then they would do the same damage.

Q One doesn't do any more than the other?

A No, sir.

Q And, if 60% of the travel by trucks was Pennsylvania trucks and 40% by out of state registered trucks, would you conclude that Pennsylvania has—trucks has contributed a little more to the damage than out of state trucks?

A I would even taken it further. If you had 99 Pennsylvania trucks and one out of state truck then most of the damage is done by the Pennsylvania trucks.

* * * *

[TESTIMONY OF BARRY FALKENSTINE]

[169] BARRY FALKENSTINE: Being duly sworn according to law was examined and testified as follows:

DIRECT EXAMINATION

BY MS. JOHNSTON:

Q Please state your name and business address for the record.

A Barry A. Falkenstine, Pennsylvania Department of Transportation, Transportation and Safety Building, Harrisburg, Pennsylvania.

Q Mr. Falkenstine, what is your position?

A My title is Pavement Management Engineer.

Q Are you a registered professional engineer?

A Yes.

Q What are your job duties?

A Primary duties are to keep the Department's pavement design procedures up to the current state of the art. I am involved with some standard drawing work for pavement construction, and also rehabilitation techniques, development of rehabilitation techniques.

Q Within PennDOT is there anyone who has more responsibility in these areas than you do?

[170] A Technically no.

Q And, what do you mean by that?

A From the technical aspects of the pavement design, no. Administratively yes.

Q How long have you been in your current position?

A Ten years.

Q What degrees do you have?

A Bachelor of Science of Civil Engineering.

Q Do you have any position within AASHTO?

A Yes.

Q What is that?

A I am a member of the Joint Task Force on Pavement Design.

Q Were you present during Doctor Kilareski's testimony?

A Yes.

Q Do you agree or disagree with his testimony on pavement deterioration?

A On pavement deterioration I agree.

Q To what extent is expected truck traffic taken into account when PennDOT designs pavement?

A To what extent it is taken into account? It is a major factor in determining a pavement thickness, the most major factor.

Q Is automobile traffic the expected volume of [171] automobile traffic taken into account when PennDOT designs pavement?

A No, not for the pavement.

Q Why?

A Because it has a very insignificant affect on the thickness of the pavement.

Q Does the PennDOT Design Manual utilize the AASHTO design procedure that Doctor Kilareski described?

A Yes.

Q To take an example, the nearby section of Interstate 83 that was recently reconstructed and expanded, are you familiar with that segment of roadway?

A Yes.

Q Was that segment designed on the assumption that heavy trucks would be using it?

A Yes.

Q If you were to have designed that roadway on the assumption that it would not be used by heavy trucks would the design have been any different?

A You are talking about the pavement design?

Q Yes, that's correct.

A Yes, it would have been different.

Q How would it have been different?

A The pavement could have been very substantially thinner than it was.

[172] Q Would there be any other differences?

A There possibly could be some geometric differences, yes.

Q Excuse me, go ahead.

A When I say geometric I'm talking things like the alignment or grades or widths of the lanes and total roadway.

Q Do you know what financial impact this different design would have?

A Are you taking just the pavement or all those other factors I just mentioned?

Q Let's take pavement.

A I have been away from the looking at prices lately so I could only make an estimate of what they—if you want an estimate.

MR. LITTLETON: Object for the record, your Honor.

THE COURT: You object to an estimate? Do you object to an estimate?

MR. LITTLETON: Yes, your Honor.

THE COURT: We sustain the objection.

BY MS. JOHNSTON:

Q If I might back up, Mr. Falkenstine, would you please describe in a little more detail the differences that would exist in the design for this roadway without trucks as compared to with trucks in the area of grades.

A I could only give a general statement that grades [173] could be steeper for automobiles, therefore, earth work could be different and a lot less expensive, movement of subgrade material.

Q How would the design of shoulders be different?

A They could be narrower, but I am not familiar with the exact AASHTO criteria on that.

Q How would lane design differ?

A They could be narrower.

Q If trucks were banned from today forward on this segment of Interstate 83, what effect would this have on the expected life of that roadway?

A Given the pavement—

MR. LITTLETON: I object to that. I don't think he is qualified as an expert in that way.

THE COURT: Well, I'm going to sustain the objection unless you want to establish a foundation.

MS. JOHNSTON: Your Honor, I will withdraw the question. No further questions.

* * * *

[CROSS EXAMINATION]

[177] Q Now, can you in any way differentiate between the damage done with a need for design for trucks between out of state registered trucks and in state registered trucks?

A With respect to pavement design a truck is a truck.

* * * *

[TESTIMONY OF EUGENE ERICKSEN]

[DIRECT EXAMINATION]

[186] Q Now, what I'd like to do now is ask you to exercise your professional judgment as to certain facets of that survey. Mr. Hughes has testified that he was the key person at American Trucking Association with respect to this litigation. That he was a non-expert in survey research and that he was the person who designed and implemented the survey. Is that consulation of facts in your judgment consistent with, or inconsistent with professional standards in the field of survey research?

A Well like any professional field we feel that experts are need to carry out proper activities.

Q And, is it consistent with professional standards that there be an interested or involved party doing the survey work?

A It is very difficult for an interested party to be objective when making judgments.

Q Now, in Mr. Hughes' deposition which is in evidence in this case he stated that there were no written

documents prepared in advance of the survey describing its methodology, [187] procedures that would be applied and the rules that would be used, and that's at pages 15, 16 and 75 and 76 of the deposition. Is that consistent or inconsistent with professional standards in the field of survey research?

A Inconsistent.

Q Why?

A Because you have either the same person carrying out activities over a long period of time, or different people carrying out the activities over a period of time, and if you don't have written procedures the rules are not likely to be applied systematically. So, that would mean that different kinds of information would be obtained from different respondents.

Q And, what is the danger in that?

A You have no basis for comparing them.

Q In his deposition Mr. Hughes stated and I'm going to try to quote this pretty accurately from page 76, that he felt there was no need to put those things in writing because he was supervising each and every survey. Do you agree with that?

A No. Every human being is subject to lapses of memory.

* * * *

[201] Q Maybe I can just ask you to summarize by telling us instead of what the American Trucking Association did in this survey, what it should have done.

A What it should have done would have been to select a sample of a reasonable number. It should have designed a questionnaire which would permit the identification of trucks with Pennsylvania license plates and out of state license plates. That would have permitted the identification of inter and intra-state trucks, and obtained the mileage for each truck which had a license plate or a decal. It should have taken a sample and it should have taken steps to make sure that the large majority of the sample actually participated in the survey. It should

have pre-tested the questionnaire. It should have validated a sub-sample of the respondents' answers.

Q Does the failure to have done these things in context of other testimony you have given raise concerns in your mind as to the validity of the information to the respondents to the survey as to the individuals who did not respond?

A Yes.

* * * *

[CROSS EXAMINATION]

[214] Q And, certainly you would agree that the survey is accurate as to the affect of the tax on the people who did, in fact, answer?

A No.

Q You wouldn't?

A Because of the problem that I indicated to you there are cases where people seemed to have confused Pennsylvania licensed trucks and foreign licensed trucks, interstate and [215] intrastate.

Q And, you don't accept Mr. Hughes' resolution of those problems?

A That's because in some of the data sheets there was no indication of phone calls.

* * * *

[DENIAL OF MOTION TO STRIKE ATA SURVEYS]

[218] MR. HOFFMAN: Now, If I can take 10 more seconds, I'd like to move now in light of Doctor Ericksen's testimony to strike the various surveys submitted by ATA as exhibits on grounds that they are not in accordance with professional standards.

THE COURT: The motion is denied.

* * * *

[PETITIONERS' EXHIBIT 1]

June 16, 1983

1979 Annual Vehicle Miles of Travel for Cargo Vehicles (Millions)

	PA. Basis VMT	Other Stat Basis VMT	TOTAL VMT
SINGLE UNITS			
2 Axle 4 tire (1)	6,252	1,396 - 18%	7,648
2 Axle 6 tire	992	248 - 20%	1,240
3 Axle Sing. Unit (2)	240	59 - 20%	299
SUBTOTAL	7,484	1,703 - 19%	9,187
COMBINATIONS			
3 Axle S.T.	54	17 - 24%	71
4 Axle ST.	451	213 - 32%	664
5 Axle ST. (3)	1,648	1,274 - 44%	2922
SUBTOTAL	2,153	1,504 - 41%	3,657
TOTAL	9,637	3,207 - 25%	12,844

(1) INCLUDES PANEL & PICKUP
(2) INCLUDES 4 Axle Single Units
(3) INCLUDES 6 Axle COMBINATIONS
SOURCE: PA TRAVEL ESTIMATE 1979 AND 1977 CENSUS OF TRANSPORTATION

JDP
Bureau for Strategic Planning

	VMT (09)	Census 77 Distribution	% travel in Pa.
2 Axle 4 tire (mc/pp)	7,645.0	.8325 *	85.368 **
2 Axle 6 tire	1,239.8	.1350	83.53%
3 Axle Single Unit +	258.7	.0325	83.83%
subtotal	9,183.5	1.0000	
3 Axle Semi trailer	40.3	.0195	73.83%
4 Axle Semi trailer	375.3	.1816	65.87%
5 Axle Semi trailer	1,651.1	.7989	54.65%
subtotal	2,066.7	1.0000	
total	11,250.2		

PA TRUCK TABLE = (Census 77)

	*	PA. Vol VMT (09)	**	1977 TOTAL PA	STATE out of State	TRUCK TOTAL
2 Axle 4T	8,796.0 (.8325)	7,322.7	(.9538)	6252.1	1396.4	7,648.5
2 Axle 6T	8,796.0 (.1350)	1,187.5	(.9353)	991.9	248.4	1,240.3
3 Axle SU	+ 8,796.0 (.0325)	285.8	(.9383)	239.6	59.0	298.6
		8,796.0		7,483.6	1,703.8	9,187.4
3 Axle ST.	3,773.5 (.045)	73.6	(.7383)	54.3	17.0	71.3
4 Axle ST.	3,773.5 (.1816)	685.3	(.6587)	451.4	212.7	664.1
5 Axle ST.	+ 3,773.5 (.7957)	3,014.6	(.5463)	1,647.5	1273.3	2921.3
		3,773.5		2,153.2	1,503.5	3656.7
				9,636.8	3,207.3	12,844

[PETITIONERS' EXHIBIT 1 (Continued)]

Department of Transportation
June 18, 1981

Estimated Travel in Pennsylvania
by Truck Type—1979

Mr. William J. Green, Director
Office of Press and
Legislative Affairs

Attn: Rick Atkinson

Raymond C. Seaman, Director
Bureau of Advance Planning

In response to your request for assistance on a review of HB1376, we have estimated truck travel by vehicle type. Sources for this estimate were the Pennsylvania 1979 travel statistics maintained by this Bureau and the 1977 Census of Transportation for Pennsylvania (U.S. Department of Commerce).

1979 Annual Vehicle Miles of Travel (millions)

Single Units	Pa. Regis. Vehicles	Other State Regis. Vehicles	Total
2 axle (1)	7,249	1,640	8,889
3 axle (2)	243	55	298
Total	7,492	1,695	9,187
Combinations			
3 axle	43	28	71
4 axle	402	262	664
5 axle (3)	1,770	1,152	2,922
Total	2,215	1,442	3,657
TOTAL	9,707	3,137	12,844

(1) Includes panel and pickup trucks
(2) Includes 4 axle single unit trucks
(3) Includes 6 axle combinations

Using the rates as outlined in the proposed bill, we estimated that approximately $70 million dollars of revenue would be produced annually.

510:DJT:mh

cc: Mr. Douglas Tobin, Director, Bureau of Motor Vehicles

Ms. Mary Kotz, Fiscal and Systems Management

Mr. Richard Johnston, Revenue, OPEP, Strawberry Square

[PETITIONERS' EXHIBIT 2]

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

LEROY S. ZIMMERMAN
ATTORNEY GENERAL

March 16, 1982

Reply To:

1641 Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

Thomas A. Schneider, Esquire
Morgan, Lewis & Bockius
2100 The Fidelity Building
123 South Broad Street
Philadelphia, PA 19108

Re: American Trucking Associations, Inc., et al. v. Robert K. Bloom, et al.—No. 315 C.D. 1982

Dear Tom:

In response to the information requested by plaintiffs in the Notice of Deposition dated February 23, 1982, the defendants offer information as follows:

1. Two reels of computer tapes plus an instruction sheet. Your clients should be able to derive from these tapes the information requested in Paragraphs (a) and (b) of the notice of deposition;

2. In response to request (c), 130,910 vehicles in excess of 17,000 pounds are registered in Pennsylvania;

3. In response to request (d), the number of identification markers sold for the year beginning April 1, 1981 is 399,240; and,

4. In response to request (e), Pennsylvania has entered into apportioned registration agreements with Alabama, Alberta, Arizona, Arkansas, Colorado, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, North Dakota, South Dakota, Tennessee, Texas, Utah, Virginia, Wisconsin, and Wyoming.

I trust that the foregoing information will be sufficient for your purposes. Please let me know if there are any problems.

Very truly yours,

/s/ Andrew S. Gordon
ANDREW S. GORDON
Deputy Attorney General

ASG/jac
Enclosures

[PETITIONERS' EXHIBIT 3]

AMERICAN
TRUCKING
ASSOCIATIONS, INC.
1616 P Street, N.W., Washington, D.C. 20036

INDUSTRY RELATIONS DIVISION
J. R. Halladay
Managing Director

DEPARTMENT OF STATE LAWS,
TAXATION AND RECIPROCITY
Douglas A. Hughes,
Director
(202) 797-5402

March 24, 1982

MEMORANDUM

TO: Pennsylvania Fuel Users

FROM: Douglas A. Hughes

SUBJECT: *Pennsylvania Marker Fee Legality*

As you probably know, the American Trucking Associations, Inc., has sued the Commonwealth of Pennsylvania challenging the constitutionality of its "$25 identification marker fee" taxing scheme. As with our earlier litigation in New England, we hope to show the court that this taxing scheme falls so much more heavily on interstate trucks based in states other than Pennsylvania than on Pennsylvania-based trucks that it fails to meet the constitutionality criteria established by the U.S. Supreme Court. You'll be interested to know that a few weeks ago the Commonwealth agreed with stipulations filed with the Court to provide refunds of 1982 identification marker fees if ATA proved its case in this litigation.

In our pursuit of this litigation, we urgently need your help in developing necessary data to demonstrate the unconstitutionality in this taxing scheme to the Court. The proof of our case, in other words, must begin with *you*.

Please complete the attached questionnaire and return it to the undersigned on or before April 30, 1982. The mileage data will be necessary in our proof of the scope of your operations both within and beyond Pennsylvania and should be based upon your four quarterly fuel use reports filed for 1981 with the Pennsylvania Department of Revenue. Trip permit information, where appropriate, will also be helpful for those carriers who are able to use this mechanism to minimize their overall costs.

We recognize that developing this information will not be an easy task, but hope that you'll agree that the undertaking is worth the investment. If you have any questions concerning this request for assistance, please feel free to call the undersigned at 202/797-5402.

/s/ Douglas A. Hughes
DOUGLAS A. HUGHES

/arg
Attachment
cc: J. R. Halladay

A National Federation Having an Affiliated Association in Each State

Please return before April 30, 1982 to:

Department of State Laws, Taxation
and Reciprocity
AMERICAN TRUCKING
ASSOCIATIONS, INC.
1616 "P" Street, N.W.
Washington, D.C. 20036

1981 MOTOR CARRIER OPERATIONS STUDY
—PENNSYLVANIA—

The following data is provided to ATA for its use in litigation challenging the constitutionality of the Pennsylvania "$25 identification marker fee" taxing scheme.

1. Total 1981 fleet mileage everywhere ———— miles.

2. Total 1981 fleet mileage in Pennsylvania ——— miles.

3. Total number of 1981 $25 identification markers purchased (both initial and supplemental applications) from the Pennsylvania Department of Revenue for display on trucks/tractors operating in Pennsylvania.

———— decals

4. Total number of $5 trip permits purchased from the Pennsylvania Department of Revenue in 1981 for operations in Pennsylvania conducted by vehicles not displaying the identification decal.

———— trip permits

5. Please identify the state(s) in which your vehicles (i.e. trucks and tractors over 17,000 lbs. GVW) are

registered and the associated number of vehicles registered in each state.

State	Number Trucks/Tractors
_____	_____
_____	_____
_____	_____
_____	_____

REMARKS:

Company Name _____

Street Address _____

City/State/Zip _____ Telephone _____

Name of Person Completing Form _____

Position _____

[PETITIONERS' EXHIBIT 4]

AMERICAN
TRUCKING
ASSOCIATIONS, INC.
1616 P Street, N.W., Washington, D.C. 20036

INDUSTRY RELATIONS DIVISION
J. R. Halladay
Managing Director

DEPARTMENT OF STATE LAWS,
TAXATION AND RECIPROCITY
Douglas A. Hughes,
Director
(202) 797-5402

March 24, 1982

MEMORANDUM

TO: Pennsylvania Truck Owners

FROM: Douglas A. Hughes

SUBJECT: *Pennsylvania Marker Fee Legality*

As you probably know, the American Trucking Associations, Inc., has sued the Commonwealth of Pennsylvania challenging the constitutionality of its "$25 identification marker fee" tax. As with our litigation in New England, we are hopeful of resolving these issues as quickly as possible in order to avoid any retaliation from other states against Pennsylvania-registered vehicles and to open the way for full Pennsylvania membership in the *International Registration Plan.*

In our pursuit of this litigation, we urgently need your help in developing necessary data to demonstrate the unconstitutionality of this taxing scheme to the court. The proof for our case, in other words, must begin with *you.*

Please complete the attached questionnaire and return it to the undersigned on or before April 30, 1982. The mileage data will be necessary in our proof of the scope of your operations both within and beyond Pennsylvania and should be based upon your four quarterly fuel use reports filed for 1981 with the Pennsylvania Department of Revenue. The vehicle data should reflect the number of vehicles in your fleet during 1981 which were registered in the Commonwealth.

We recognize that developing this information will not be an easy task, but hope that you'll agree that the undertaking is worth the investment. If you have any questions concerning this urgent request for assistance, please feel free to call the undersigned at 202/797-5402.

/s/ Douglas A. Hughes
DOUGLAS A. HUGHES

/arg
Attachment
cc: J. R. Halladay

A National Federation Having an Affiliated Association in Each State

Please return before April 30, 1982 to:

Department of State Laws, Taxation
and Reciprocity
AMERICAN TRUCKING
ASSOCIATIONS, INC.
1616 "P" Street, N.W.
Washington, D.C. 20036

1981 MOTOR CARRIER OPERATIONS
—PENNSYLVANIA—

The following data is provided to ATA for its use in litigation challenging the constitutionality of the Pennsylvania "$25 identification marker fee" taxing scheme.

1. Total 1981 fleet mileage everywhere ——— miles.
2. Total 1981 fleet mileage in Pennsylvania ——— miles.
3. Total number of motor vehicles (i.e. trucks and tractors) exceeding 17,000 lbs. gross vehicle weight registered in Pennsylvania in 1981.

   ——— trucks & tractors

4. Do you operate trucks or tractors exceeding 17,000 lbs. gross vehicle weight bearing license plates from states other than Pennsylvania? (Circle one)

   Yes No

   If yes, please designate the state(s) of registration and the number of trucks and tractors registered in each state.

State	Number Trucks/Tractors
_____	_____
_____	_____
_____	_____
_____	_____

REMARKS:

Company Name _____

Street Address _____

City/State/Zip _____ Telephone _____

Name of Person Completing Form _____

Position _____

[PETITIONERS' EXHIBIT 5]

PENNSYLVANIA FOREIGN-BASED
VEHICLE REGISTRANTS
HIGHWAY USE OPERATING CHARACTERISTICS
1981

Number of Carriers:	5,901
Number of Markers:	169,220
Number of Trip Permits:	5,505
Miles Everywhere:	12,430,631,279
Miles in Pennsylvania:	766,839,013
Percent of Miles in Pennsylvania:	6.16%
Total Marker Cost:	$4,230,500
Total Trip Permit Cost:	$27,525
Total Cost:	$4,258,025
Average Cost/Mile:	$0.0056

BEST AVAILABLE COPY

PENNSYLVANIA FOREIGN-BASED VEHICLE REGISTRANTS
HIGHWAY USE OPERATING CHARACTERISTICS
1981

REGISTRANT/OWNER	1981 MILES EVERYWHERE	1981 MILES PENNSYLVANIA	PENNA. MILES % OF TOTAL	PENNA.MILES PER TRUCK	NUMBER MARKER	NUMBER PERMITS	MARKER/PERMIT COST	COST PILE
OAKLEY MARINE SERVICES	79,507	9,154	11.51	1,144	8		$ 200	$0.0218
OAKLEY PRODUCE	86,595	820	.94	820	1		$ 25	$0.0304
OAKVIEW NURSERY INC	33,322	7,082	21.25	3,541	2	1	$ 55	$0.0077
OATEY CO	164,882	8,067	4.89	2,689	3		$ 75	$0.0092
OBORN LUMBER INC	183,334	12,916	7.04	3,229	4		$ 100	$0.0077
OBOYLE TRANSFER COMPANY INC	25,503	1,366	5.35	683	2		$ 50	$0.0366
OBRIEN MACHINERY CO	159,109	29,823	18.74	5,964	5		$ 125	$0.0041
OCEAN SALVORS COMPANY	55,008	2,272	4.13	454	5		$ 125	$0.0550
OCEANVIEW SEAFOOD CO INC	96,000	200	.20	100	2		$ 50	$0.2500
ODELL FLEMING TRUCKING INC	14,255	2,151	15.08	717	3		$ 75	$0.0348
OFFLEITCH & BEHLING INC	23,249	16,256	69.92	16,256	1		$ 25	$0.0015
OHIO BUILDING PROD INC	6,638	1,046	15.75	523	2		$ 50	$0.0478
OHIO COUNTING SCALE INC	36,005	345	.95	115	3		$ 75	$0.2173
OHIO FAST FREIGHT INC	15,967,099	3,343,381	20.93	7,885	424	20	$ 10,700	$0.0032
OHIO PACIFIC EXPRESS INC	4,964,490	55,323	1.11	1,229	45		$ 1,125	$0.0203
OHIO PACKAGING CORP	202,044	1,479	.73	295	5		$ 125	$0.0845
OHIO PALLET CO	109,597	3,570	3.24	3,570	1		$ 25	$0.0070
OHIO PLATE GLASS CO	461,221	92,244	19.99	13,177	7	4	$ 195	$0.0021
OHIO POLY CORP	172,876	26,843	15.52	13,421	2		$ 50	$0.0018
OHIO PURE FOODS INC	154,301	13,205	8.55	4,401	3		$ 75	$0.0056
OHIO RUBBER CO	285,014	16,266	5.70	1,807	9		$ 225	$0.0138
OHIO VALLEY CHEM INC	4,250	692	16.13	346	2		$ 50	$0.0722
OKLAHOMA FURN MFG CO	1,643,060	4,093	.24	186	22		$ 550	$0.1343
OLD DOMINION BOX CO INC	305,100	1,366	.44	273	5		$ 125	$0.0915
OLD DOMINION FREIGHT LINE INC	66,739,086	2,216,952	3.32	2,121	1,045		$ 26,125	$0.0117
OLD DOMINION TRUCK LEASING INC	3,124,158	214,595	6.86	2,617	82		$ 2,050	$0.0059
OLD MTHR HARD DGFD CO INC	93,724	18,745	20.00	6,248	3		$ 75	$0.0040
OLD NORTH MFG CO INC	113,571	563	.49	187	3		$ 75	$0.1332
OLEKSA ENTERPRISES INC	34,541	17,612	50.98	17,612	1		$ 25	$0.0014
OLEN B SPARCY	128,263	1,015	.79	507	2		$ 50	$0.0492
OLIN CHEMICALS RUBBER SERVICE	45,265	1,354	2.99	1,354	1		$ 25	$0.0184
OLINDOS IMPORT FOODS	32,002	14,712	45.97	7,356	2		$ 50	$0.0033
OLIVER TRUCKING CO INC	3,655,221	98,286	2.68	1,927	51		$ 1,275	$0.0129
OLSONITE CORP PLUMBERS WOODWOR	254,991	38,551	15.11	19,275	2		$ 50	$0.0012
OLYMPIA FARMS DBA GEORGE S MIN	6,267	574	9.15	574	1	1	$ 30	$0.0522
OMAN CONSTRUCTION COMPANY INC	245,558	471	.19	157	3	1	$ 80	$0.1698
ONE TRUCKING INC	287,597	2,113	.73	1,056	2		$ 50	$0.0236
ONEIDA DIST INC	94,295	9,185	9.74	4,592	2		$ 50	$0.0054
ONEIDA MOTOR FREIGHT INC	14,090,000	610,000	4.32	4,013	152		$ 3,800	$0.0062
ONEITA KNITTING MILLS	350,507	1,502	.42	500	3	1	$ 80	$0.0532
ONTARIO HARDWOOD CO INC	83,250	200	.24	200	1		$ 25	$0.1250
ONTARIO PIPELINE INC	163,154	10,977	6.72	914	12	2	$ 310	$0.0282
OQUINN TRUCK LINES	500,184	82,753	16.54	10,344	8		$ 200	$0.0024
ORBIT TRANSPORT INC	2,666,258	99,178	3.71	901	110		$ 2,750	$0.0277
OREGON METALLURGICAL CORP	1,436,219	52,062	3.62	4,004	13		$ 325	$0.0062

[PETITIONERS' EXHIBIT 7]

PENNSYLVANIA-BASED INTERSTATE
VEHICLE REGISTRANTS
HIGHWAY USE OPERATING CHARACTERISTICS
1981

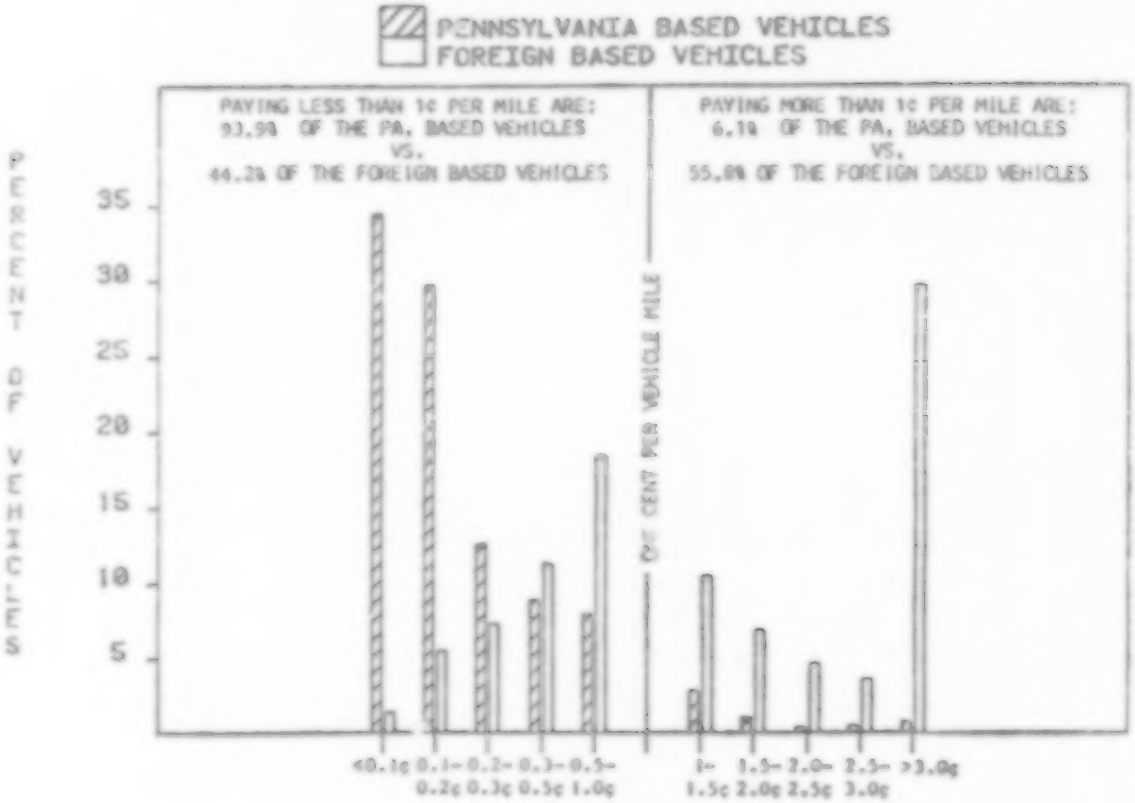
Number of Carriers:	953
Number of Vehicles:	14,253
Miles Everywhere:	709,645,219
Miles in Pennsylvania:	326,798,025
Percent of Miles in Pennsylvania:	46.05%
"Deemed" Marker Cost:	$356,326
Average Cost/Mile:	$ 0.0011

[PETITIONERS' EXHIBIT 10]

PENNSYLVANIA MARKER FEE COST COMPARISON
PENNSYLVANIA-BASED CARRIERS
v. FOREIGN-BASED CARRIERS
1981

Penna-Based			Foreign-Based	
% Total	Number	Cost/Mile	Number	% Total
0.8%	8	over 3.0¢	1,752	29.7%
0.0	0	2.9-3.0	35	0.6
0.0	0	2.8-2.9	43	0.7
0.1	1	2.7-2.8	47	0.8
0.0	0	2.6-2.7	30	0.5
0.5	5	2.5-2.6	63	1.1
0.0%	0	2.4-2.5¢	43	0.7%
0.0	0	2.3-2.4	52	0.9
0.1	1	2.2-2.3	53	0.9
0.1	1	2.1-2.2	60	1.0
0.3	3	2.0-2.1	74	1.3
0.0%	0	1.9-2.0¢	65	1.1%
0.2	2	1.8-1.9	82	1.4
0.3	3	1.7-1.8	79	1.3
0.4	4	1.6-1.7	91	1.5
0.2	2	1.5-1.6	101	1.7
0.1%	1	1.4-1.5¢	89	1.5%
0.3	3	1.3-1.4	101	1.7
1.0	10	1.2-1.3	145	2.5
0.2	2	1.1-1.2	137	2.3
1.3	12	1.0-1.1	153	2.6
0.4%	4	0.9-1.0¢	177	3.0%
0.8	8	0.8-0.9	187	3.2
1.2	11	0.7-0.8	204	3.5
2.2	21	0.6-0.7	254	4.3
3.5	33	0.5-0.6	262	4.4
3.0%	29	0.4-0.5¢	312	5.3%
6.0	57	0.3-0.4	354	6.0
12.7	121	0.2-0.3	435	7.4
29.7	283	0.1-0.2	331	5.6
34.4	328	under 0.1	90	1.5

PENNSYLVANIA MARKER FEE - CENTS PER VEHICLE MILE
PENNSYLVANIA DOMICILED VS FOREIGN BASED (OUT OF STATE)



[PETITIONERS' EXHIBIT 12]

All Pennsylvania-Based Motor Carrier Vehicles (1981)

Total Motor Carrier Vehicles	130,910 vehicles
Total "Deemed" Marker Cost @ $25.00	$3,272,750
Total Pennsylvania Miles	3,385,000,000 miles
Total Cost/Mile	$.0010

All Foreign-Based Motor Carrier Vehicles (1981)

Total Motor Carrier Vehicles	399,240
Total Actual Marker Cost @ $25.00	$9,981,000
Total Pennsylvania Miles	1,811,000,000 miles
Total Cost/Mile	$.0055

[PETITIONERS' EXHIBIT 13]

"FOREIGN-BASED" CARRIERS WHICH PURCHASED 1000 OR MORE MARKER DECALS, 1981

	Miles Penna.	Cost of Markers/ Permits (Dollars)
Aero Mayflower Trucking Co., Inc.	3,439,630	$ 74,890
Allied Van Lines, Inc.	5,031,461	107,325
Bekins Van Lines Co.	1,842,522	50,000
Bowman Transportation, Inc.	482,552	27,750
C & H Transportation	2,879,511	49,510
Carolina Freight Carriers Corp.	10,395,206	26,500
Consolidated Freightways	19,101,807	72,750
Ford Truck Leasing Division Gelco	6,652,231	52,000
Halls Motor Transit Co.	19,909,626	36,250
International Transport, Inc.	2,105,574	39,300
Lend Lease Division National Car Rental System	3,054,630	31,230
North American Van Lines, Inc.	19,205,177	161,025
Old Dominion Freight Line, Inc.	2,216,952	26,125
Riss International Corp.	8,927,529	35,000
Roadway Express, Inc.	39,031,524	80,600
Rollins Leasing Corp.	9,133,722	63,160
Ryan Leasing Co. Division Ryan Fin.	4,727,749	38,050
Saunders Leasing System, Inc.	5,658,437	65,820
Smiths Transfer Corp.	12,122,163	39,375
Tri State Motor Transit Co.	2,697,171	35,620
Yellow Freight System, Inc.	25,181,632	62,055
TOTALS	203,796,806	$ 1,174,335

AVERAGE COST PER MILE

$$\frac{\text{Decal Permit Cost}}{\text{Penna. Miles}} = \frac{1,174,335}{203,796,806} = .00576$$

PERCENTAGE OF TOTAL "FOREIGN-BASED" PENNA. MILES

$$\frac{\text{Total Above}}{\text{Grand Total*}} = \frac{203,796,806}{766,839,013} = 26.58$$

*Source: Petitioners' Exhibit No. 5 (cover sheet total)

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 315 C.D. 1982

CLASS ACTION

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners,

vs.

ROBERT K. BLOOM, Secretary of the Department of Revenue, *et al.*,
Respondents.

Washington, D.C.
Friday, May 13, 1983

DEPOSITION OF DOUGLAS A. HUGHES,

A WITNESS, CALLED FOR EXAMINATION BY COUNSEL FOR THE RESPONDENTS, PURSUANT TO NOTICE, AT THE OFFICES OF THE AMERICAN TRUCKING ASSOCIATIONS, 1616 P STREET, N.W., WASHINGTON, D.C., BEGINNING AT 9:35 A.M., BEFORE ARLENE F. VAUGHN, A NOTARY PUBLIC IN AND FOR THE DISTRICT OF COLUMBIA, WHEN WERE PRESENT ON BEHALF OF THE RESPECTIVE PARTIES:

FRIEDLI, WOLFF & PASTORE, INC.
1735 EYE STREET, N.W., SUITE 811
WASHINGTON, D.C. 20006
202/331-1981

* * * *

You want him to answer that it's a fair statement of what you understand it to be.

BY MR. HOFFMAN:

Q. I was just trying to see if I could find a nice statement of what was your goal in doing the survey.

MR. LITTLETON: Why don't you ask him that as opposed to paraphrasing it.

BY MR. HOFFMAN:

Q. My question is what is the goal that you had and is what I read a reasonable statement of your goals. If it's not, give me a different one.

A. The goal of the survey was to determine the relationship of cost for Pennsylvania-based vehicles as compared to foreign-based vehicles with respect to the $25 fee imposition.

Q. In the language of exhibit 2, you, hoped, quote, to show the court that this taxing scheme falls so much more heavily on interstate trucks based in states other than Pennsylvania than Pennsylvania-based trucks that it fails to meet the constitutional criteria established by the Supreme Court, close quote.

A. That's what the sentence says.

Q. Do you have any quarrel with that statement you wrote?

A. Certainly not.

Q. My understanding from the Maryland deposition is that you have a bachelor of science degree in economics and statistics. Am I right?

A. That is correct.

Q. Do you have any postgraduate education in either one of those areas?

A. No.

Q. Or in any area?

A. No.

Q. Was that a double major you qualified for?

A. Yes.

Q. Would you be able to tell us what your exposure was as an undergraduate in the areas of statistics and the area of survey research?

A. I don't understand the question.

Q. Did you take courses in the area of statistics?

• • • •

[RESPONDENTS' EXHIBIT 4]

SURVEY QUESTIONNAIRES: BASIC DATA

"Pennsylvania-Based"			"Foreign-Based"	
#'s	% of Total		#'s	% of Total
21,806	100%	Distributed	31,358	100%
20,116	92.2%	Not Returned	24,930	79.6%
1,690	7.8%	Returned	6,428	20.4%
737	3.3%	Rejected	527	1.7%
953	4.5%	Used	5,901	18.8%

[RESPONDENTS' EXHIBIT 6]

"Foreign-Based" Carriers With Data Sheets, Question No. 5, Reflecting Pennsylvania Registered Vehicles

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Source: Data Sheets Supporting Pages 11, 37, 63, 89 and 115 of Computer Print-Out of "Pennsylvania Foreign-Based Vehicle Registration, Highway Use Operating Characteristics, 1981"

Total Number in Sample: 222

Number in Sample with Pennsylvania Registered Vehicle: * 20

Percent of Sample: 9%

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* NOTE: Does not include data sheets which, although reflecting Pennsylvania-registration, appear to a certainty to have misinterpreted Question 5 on the data sheets.

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 315 C.D. 1982

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners

v.

ROBERT K. BLOOM, Secretary of the Department of Revenue, *et al.*,
Respondents

STIPULATION

Petitioners commenced this action to have Section 2102 of the Vehicle Code, 75 Pa. C.S. § 2102, declared unconstitutional and all enforcement of it enjoined.

Since Section 2102 requires, under penalty of law, every motor carrier vehicle operating into, from or through Pennsylvania to bear an identification marker costing $25.00 per year to demonstrate compliance with the Motor Carriers Road Tax Act, affected motor carriers are presently in the process of paying $25.00 per vehicle for such markers for the year beginning on April 1, 1982.

In an effort to have the Court establish an escrow or similar type arrangement to safeguard the payments being made by affected motor carriers for identification markers pending the outcome of this suit, petitioners filed a Motion for Special Injunction together with their Petition for Review.

To avoid the time and expense of a hearing on the Motion, however, petitioners and respondents have reached the following Stipulation concerning the disposition of the payments in question:

1. Respondents agree that, if petitioners prevail upon the merits of their Petition for Review, pursuant to 72

P.S. § 503, all affected motor carriers will be entitled to receive a refund of payments for identification markers for the year beginning April 1, 1982. Further, respondents agree that the motor carriers will receive a refund of such payments under the terms set forth below.

2. Within ninety (90) days after a final decision on the merits in which Section 2102 shall have been declared unconstitutional or its enforcement enjoined and all appeals have been exhausted or abandoned, respondents shall refund all payments for identification markers for the year beginning April 1, 1982. If, after (80) days from the date of the final decision, respondents reasonably believe for reasons not foreseeable at the time of this Stipulation that they will not be able to complete all refunds within the ninety (90) day period, they shall have the right to apply to the Commonwealth Court for an appropriate modification of this paragraph.

3. Respondents agree that, in the event refunds are due, they will identify and transmit the correct amount of refund to each affected motor carrier. Respondents further agree that no affected motor carrier will be required to proceed before the Board of Finance and Revenue or otherwise come forward with any type of proof in order to be entitled to such refund.

4. If for any reason a motor carrier entitled to receive a refund for identification markers for the year beginning April 1, 1982 does not receive a refund in the correct amount from respondents pursuant to paragraph 3, the motor carrier, upon submitting reasonable proof of such entitlement in writing addressed to Andrew S. Gordon, Esquire, Office of Attorney General, 16th Floor, Strawberry Square, Harrisburg, PA 17120, shall forthwith receive the proper refund. Notwithstanding the alternate procedure described in this paragraph, it is the intent of this Stipulation that refunds will be made under the procedure set forth in paragraph 3.

5. Petitioners and respondents agree to defer the question of whether affected motor carriers are entitled to receive interest upon any payments refunded to them. Affected motor carriers shall recover from respondents such interest upon the amounts refunded to them as the law may provide at the time the refunds are made.

6. Nothing in this Stipulation shall be construed to relieve motor carriers from complying with the requirements of Section 2102 or from payment of the Motor Carriers Road Tax, as provided for in the Motor Carriers Road Tax Act, Act of June 19, 1964, P.L. 7, *as amended*, 72 P.S. §§ 2617.1-2617.26.

7. This Stipulation relates solely to a procedure for refunds if petitioners ultimately prevail on their claims and neither petitioners nor respondents shall, by virtue of having entered into this Stipulation, be deemed to have waived any claim, defense or position regarding the merits of this action.

8. In consideration of the covenants and agreements above, petitioners withdraw the Motion for Special Injunction previously filed.

[Illegible]
Attorney for Petitioners

[Illegible]
Attorney for Respondents

Date: February 25, 1982

The within stipulation is approved hereby February 25, 1982.

/s/ J. MacPhail
Judge

CERTIFIED FROM THE RECORD
FEB 26 1982

/s/ Francis C. Barbush
Chief Clerk

Section 3. This act shall take effect immediately except that the provisions of section 2102 which relate to the increase in the annual fee for identification markers shall be applicable only to those markers acquired after the effective date of this act and shall not affect any valid current identification markers for the remainder of the period for which they were issued and except that the provisions of section 2104 (relating to penalties) shall take effect in 60 days.

On the question.

Will the House agree to the amendments?

The SPEAKER. The Chair recognizes the gentleman from Lehigh, Mr. Zeller.

Mr. ZELLER. Mr. Speaker, to help all of us, I believe if we take the section of the amendment on the second page, all they corrected is the $2 to $25. Is that all that has been corrected?

The SPEAKER. The Chair will recognize the sponsor of the amendment, Mr. Michlovic.

Mr. MICHLOVIC. Yes. You are correct, Mr. Speaker. The only change was changing the $2 to $25.

The SPEAKER. The Chair recognizes the gentleman from Lancaster, Mr. Wenger.

Mr. WENGER. Mr. Speaker, if we impose the $25 fee on out-of-state trucks, I am sure that we will find neighboring states retaliating. They have always done this in the past when we tried this type of thing.

I think this amendment is the kind of amendment that is ill-conceived. It was drawn hastily in an attempt to raise revenue to balance the budget. I think it is going to come back to haunt us.

This amendment not only would apply to fleets of trucks but would apply to individual trucks. We can see that if neighboring states pass similar legislation in

retaliation, for instance, you could have a farmer with a farm truck, one truck, that is used only seasonally, and he might take his produce, his apples, or his peaches into New York State to sell them. He would have to buy a sticker there. He might go into the State of Maryland to buy fertilizer several times a year. He would have to buy a sticker there. He might go into New Jersey once a year to buy chemicals. He would have to buy a sticker there. You end up penalizing a truck that is used very little and already is paying a license fee in proportion considerably more per miles traveled and per pounds hauled than anyone else, and he is going to end up paying perhaps several hundred dollars in fees to other states.

I think it is the kind of thing that is very regressive. When you look at the amount of money that it raises for our state and you look at the penalty that it is going to place upon our economy and upon the people in Pennsylvania, the resulting price and higher price to consumers. I think it is imperative that we reject this amendment, and I call for a "no" vote. Thank you, Mr. Speaker.

The SPEAKER. The Chair recognizes the minority whip.

Mr. MANDERINO. Mr. Speaker, I rise in support of this amendment. This amendment will bring in, as estimated, somewhere around $9.2 million. This is for the registration increase on the out-of-state truckers.

In addition to that particular feature of this bill, there will also be additional moneys because of the tightening of the loopholes that are contained in this bill on truckers who come through Pennsylvania and we are not getting our fair share of liquid fuel taxes from them. In the first place, we cannot find them because of the procedures presently used which exempt a whole category of trucks coming in from out of state. We cannot identify them because some of them are reciprocal states. We are a corridor state in Pennsylvania, and to receive the amount of money in the liquid fuel fund that we now receive

being a corridor state, it is obvious that we need the Michlovic amendment to tighten up the procedures in addition to the registration increase.

It is estimated, Mr. Speaker, by our revenue people in the Appropriations Committee that in addition to the $9 million that will come in on registrations, we will receive in the liquid fuel fund because of the procedures an additional low figure of about $15 million and an additional high figure of about $25 million.

Now, Mr. Speaker, when we received these revenue estimates, we talked to Mr. Cohen—I did not personally; it is my understanding the staff did—to review with him whether or not what we were saying would be true so far as additional moneys in the liquid fuel fund. Although he was not willing to certify that those estimates that we had would occur, he did say in his personal opinion he thought our figures were correct, that we would receive this additional $15 million to $25 million in the liquid fuel tax. This is money we are missing because of our procedures from the out-of-state truckers, and we ought to be picking this up in the liquid fuel tax and the registration and the tightening of loophole procedures that are affected by this bill.

I urge an affirmative vote, Mr. Speaker.

The SPEAKER. The Chair recognizes the gentleman from Cambria, Mr. Yahner.

Mr. YAHNER. Mr. Speaker, I hate to go against our good leader here, but in this case this amendment, I think, is a very bad amendment. It will raise the cost of trucking not only for industry but also for farmers. It will also have an effect on your food prices.

Just as sure as God made green apples, if we impose this $25 fee on out-of-state trucks coming into Pennsylvania, you will wake up the next morning and they will be doing the same to us. It will just be a double taxation, and I would hope that everyone would vote to oppose this amendment. Thank you.

The SPEAKER. The Chair recognizes the gentleman from Snyder, Mr. Thomas.

Mr. THOMAS. Mr. Speaker, my remarks will not change basically from what I said prior to the corrected amendment. I am sure this amendment could work in the adverse for Pennsylvania. Although it might collect more revenue immediately for Pennsylvania, it could work in the adverse because of those states which would say, what Pennsylvania does to us, we will do to them.

I would strongly recommend that you think about it and vote "no" on this amendment.

The SPEAKER. The Chair recognizes the minority whip.

Mr. MANDERINO. Mr. Speaker, very briefly, we were concerned when we first came up with the procedures of this bill about what effect it would have on Pennsylvania truckers. We had the arm of the legislature, the Legislative Office for Research Liaison, do a study to determine what dollar effect it would have on Pennsylvania truckers. Now the bill is going to bring in $9 million in fees. It is also going to bring in from $15 million to $25 million in liquid fuel taxes, and its effect on Pennsylvania as established by our research arm would be about $1 million spread through all the truckers in Pennsylvania. I think that is a negligible figure based on what we are going to take in, and I think we ought to vote in favor of this bill.

The SPEAKER. The Chair recognizes the gentleman from Lehigh, Mr. Zeller.

Mr. ZELLER. Mr. Speaker, what was said by Mr. Thomas, Mr. Wenger, and Mr. Yahner is true. I would like to remind you what happened last session.

Mr. Klingaman introduced a bill that was a reciprocity against a neighboring state. Because of our produce going into that state, they charged us a license. We had a big meeting on this. Everybody was alarmed. Mr. Yahner was chairman. We put through a bill here to nail those states that would do it to us, and that is exactly what is going to happen here—reciprocity. We had

a dose of that last session, and here we are right back again, and now we are creating it.

Now the problem is going to be the cost upon the consumer. I have checked with every one of our trucking firms which we have in my area from the largest, Yellow Freight, Roadway, all the way down to the smallest trucking firm, and they are all against it. They are also very disturbed. You are going to get a double whammy on them when HB 613 comes up, and with this one we are really going to get hit.

So I tell you, if you have any kind of respect at all for the consumer, who is going to be charged for it because there is no free ride and they are going to get nailed, you might as well knock it down.

The SPEAKER. The Chair recognizes the gentleman from Allegheny, Mr. Michlovic.

Mr. MICHLOVIC. Mr. Speaker, I would beg to differ with the prior speaker. There is a free ride right now. There is a free ride for truckers who go through Pennsylvania, take advantage of the reciprocal agreements, are not audited on their liquid fuels accounts, have no incentive therefore to buy gas in Pennsylvania. They buy gas in neighboring states, get a credit in those states for their gas purchases, and they do not pay any liquid fuels tax to Pennsylvania.

I say they are getting a free ride, and we should stop it now.

The SPEAKER. The Chair recognizes the gentleman from Butler, Mr. Burd.

Mr. BURD. Mr. Speaker, I would just like to point out one thing that the gentleman made a statement on. I hope that he is aware of the fact that we do have a fuel and road use tax law in effect in Pennsylvania right now. I would like to explain that just a little bit if you will give me the time.

In the event that a truck does travel through Pennsylvania and it does not buy fuel in our state, it is required to pay 4 cents per mile for running in the state

and, of course, it is up to the office that we have and the laws that we have to collect those moneys. Those trucking firms are being audited and, if it was done properly, it could amount into the fifties of millions of dollars. If you could just visualize Interstate 80 alone, with that formula that I just gave you, it would amount to around $12 just to travel the length of Interstate 80, and multiply that by 10,000 trucks per day. I am sure that you mathematicians could figure that out very quickly what that would amount to.

I am saying here that if we would enforce that, it would be a much better thing to do than to try and impose another tax on out-of-state trucks and get into reciprocity problems that we have been talking about today. I certainly urge all of my colleagues on this side and that side of the aisle to vote "no" on this amendment. Thank you, Mr. Speaker.

The SPEAKER. The Chair recognizes the minority whip.

Mr. MANDERINO. Mr. Speaker, the gentleman who just spoke is entirely correct. We do have that kind of a thing on the books. That is what we are enforcing. That is what we are talking about, not a new tax. We are talking about that tax which you referred to, the logging of miles in Pennsylvania. The enforcement procedures are terrible and that is what we are trying to correct with this bill.

The SPEAKER. The Chair recognizes the gentleman from York, Mr. Foster.

Mr. A. C. FOSTER. Mr. Speaker, this is indeed an amendment to the Motor Carrier Road Tax Act of Pennsylvania which we currently have. The most significant change is the increase in the fee for the decal to $25; but perhaps the most significant part of all is the changing of the enforcement procedure from that of a misdemeanor to a summary offense. This indeed has been needed for a long time because, frankly, the State Police do nothing to enforce the Motor Carrier Act at the pres-

ent time because of the clumsy enforcement procedure, the necessity to go into court. It just is not enforced and, furthermore, with many trucks from reciprocal states plus the owner-operators of one truck on an out-for-hire basis which is not decaled, the State Police are at a loss to enforce the act.

The amendment is a good one. I think that we should vote in the affirmative.

The SPEAKER. The Chair recognizes the gentleman from Philadelphia, Mr. Salvatore.

Mr. SALVATORE. I concur with my colleague, Mr. Foster, who worked in road taxes for 10 years. So I think that he knows a little about road taxes. One of the provisions of this amendment which he spoke to was that we change it from a misdemeanor to a summary. That is a very important change because, as he stated, the State Police would not stop any trucks because once they did stop a truck, the question would arise, who would physically impound a truck while it was a misdemeanor. If you make it a summary, the man pays his fine and he is on his way. That is why the law is not being enforced in Pennsylvania today.

AXLE TAX CASE

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No.

CLASS ACTION

AMERICAN TRUCKING ASSOCIATIONS, INC.
1616 "P" Street, N.W.
Washington, D.C. 20036,

TRI-STATE MOTOR TRANSIT COMPANY
P.O. Box 113
Joplin, Missouri 64802,

INTERSTATE VAN LINES, INC.
5801 Rolling Road
West Springfield, Virginia 22152,

INTERSTATE TRUCK LEASING, INC.
2700 Palmyra Road
Albany, Georgia 31707

and

ASTRO CONTAINER COMPANY,
A Division of ALLIED DRUM SERVICES, INC.
P.O. Box 41046
Evendale, Ohio 45241,

individually and on behalf of a
class of interstate motor carriers
similarly situated,

Plaintiffs,

v.

ROBERT K. BLOOM, Secretary of the
Department of Revenue of the
Commonwealth of Pennsylvania
11th Floor Strawberry Square
Harrisburg, PA 17127,

LEROY S. ZIMMERMAN, Attorney General
of the Commonwealth of Pennsylvania,
16th Floor Strawberry Square
Harrisbury, PA 17127, and

DANIEL F. DUNN, Commissioner of
the State Police of the Commonwealth
of Pennsylvania
1800 Elmerton Avenue
Harrisburg, PA 17109,

Defendants.

PETITION FOR REVIEW

Nature of the Action

1. This is a class action seeking to enjoin and have declared unconstitutional under both the United States and Pennsylvania Constitutions the various provisions of the Axle Tax For Highway Bridge Improvement Act ("Axle Tax"), 75 Pa. C.S. § 9901 *et seq.*, as they impose a new tax upon motor carriers operating certain motor carrier vehicles within the Commonwealth. 75 Pa. C.S. § 9902 ("Section 9902"), which imposes the tax, will take effect on April 1, 1983, and requires the operator of each motor carrier vehicle (defined as "every truck, truck tractor or combination having a gross weight or registered gross weight in excess of 26,000 pounds") entering into and operating on the roads of the Commonwealth to pay a tax equal to $36 per axle of each vehicle.

2. The plaintiffs, on behalf of themselves and the class of all interstate motor carriers similarly situated, contend and in this action seek to prove that Section 9902 of the Vehicle Code, facially and actually:

(a) discriminates against and burdens interstate commerce in violation of the Commerce Clause of the U.S. Constitution, Article I, Section 8;

(b) deprives motor carriers operating non-Pennsylvania-based motor carrier vehicles of rights, and subjects them to obligations not shared by motor carriers operating motor carrier vehicles based in the Commonwealth, in violation of the Privileges and Immunities Clause of the U.S. Constitution, Article IV, Section 2;

(c) is incompatible with and contrary to federal law and regulations on a subject matter in which the federal standards preempt and preclude inconsistent state requirements in violation of the Supremacy Clause of the Constitution, Article VI, Section 2;

(d) deprives motor carriers operating non-Pennsylvania-based motor carrier vehicles of the equal protection of the laws in violation of the Fourteenth Amendment to the U.S. Constitution and of rights, privileges or immunities secured by the Constitution and laws of the United States in violation of 42 U.S.C. § 1983; and

(e) constitutes a tax upon a single class of subjects within the territorial limits of the Commonwealth, which tax is not uniform in its impact upon motor carriers operating non-Pennsylvania-based motor carrier vehicles and motor carriers operating motor carrier vehicles registered in Pennsylvania, in violation of the uniformity provision of the Pennsylvania Constitution, Article 8, Section 1.

Jurisdiction

3. The original jurisdiction of this Court is invoked pursuant to 42 Pa. C.S. § 761(a) in that this is a civil action brought against duly appointed and authorized officers of the Commonwealth government acting in their official capacities. Declaratory relief is prayed for under the provisions of the Declaratory Judgment Act, 42 Pa. C.S. § 7531 *et seq.*, and preliminary and permanent injunctive relief is sought pursuant to Pa. R.C.P. 1501-1550 governing actions in equity, which rules are appli-

cable to the instant proceedings as a result of Pa. R.A.P. 106.

The Parties

4. Plaintiff American Trucking Associations, Inc. ("ATA") is a national non-profit corporation organized and operating under the non-profit corporation laws of the District of Columbia and with its principal place of business located there. ATA is a federation of 51 state trucking associations, including the District of Columbia, and 13 national conferences. It represents every type and geographical scope of motor carrier operation in the United States, including over 10,000 interstate for-hire carriers, and tens of thousands of private and local carriers, many of whose motor carrier vehicles are qualified for operation within the Commonwealth of Pennsylvania and are subject to the requirements of Section 9902 of the Vehicle Code.

5. Plaintiff Tri-State Motor Transit Company (hereinafter referred to as "Tri-State") is a Delaware corporation with its principal place of business located in Joplin, Missouri. Tri-State is an interstate motor carrier as defined in the Interstate Commerce Act operating under certificates of authority issued by the Interstate Commerce Commission. At present all of its motor carrier vehicles are qualified for operation within the Commonwealth of Pennsylvania and are subject to the Axle Tax imposed by Section 9902 of the Vehicle Code.

6. Plaintiff Interstate Van Lines, Inc. (hereinafter referred to as "Interstate") is a Virginia corporation with its principal place of business located in West Springfield, Virginia. Interstate is an interstate motor carrier as defined in the Interstate Commerce Act operating under certificates of authority issued by the Interstate Commerce Commission, and engaged in the transportation of household goods. At present all of its motor carrier vehicles are qualified for operation within the Com-

monwealth of Pennsylvania and are subject to the Axle Tax imposed by Section 9902 of the Vehicle Code.

7. Plaintiff Interstate Truck Leasing, Inc. (hereinafter referred to as "Leasing") is a Georgia corporation with its principal place of business located in Albany, Georgia. Leasing is engaged in the business of leasing and renting trucks. At present all of its rental vehicles are qualified for operation within the Commonwealth of Pennsylvania and are subject to the Axle Tax imposed by Section 9902 of the Vehicle Code.

8. Plaintiff Astro Container Company (hereinafter referred to as "Astro") is a division of Allied Drum Services, Inc., which is a Kentucky corporation with its principal place of busines in Louisville, Kentucky. Astro's principal place of business is in Evendale, Ohio. Astro operates a private fleet of motor carrier vehicles for the delivery of its manufactured products, which fleet is subject to Axle Tax imposed by Section 9902 of the Vehicle Code.

9. Plaintiffs have a direct, personal and particular interest in legislation that purports to tax the movement of motor carrier vehicles into, from and through Pennsylvania in that trucks, truck tractors and combinations owned and operated by plaintiffs and/or their affiliates must travel within the Commonwealth in order to transport and deliver goods and merchandise in interstate commerce.

10. The defendants in this action are the individuals empowered by law to administer and enforce the legislation challenged herein. Each of the defendants is a citizen of Pennsylvania and their duties and responsibilities are as follows:

(a) Robert K. Bloom is Secretary of the Department of Revenue, who is charged with the duty to administer and enforce the provisions of the Axle Tax.

(b) Leroy S. Zimmerman is Attorney General of the Commonwealth of Pennsylvania and is charged with the duty to enforce the laws of the Commonwealth.

(c) Daniel F. Dunn is Commissioner of the Pennsylvania State Police and is charged with the duty to enforce the laws of the Commonwealth. (Defendants are hereinafter referred to collectively as "the Commonwealth.")

* * * *

The Class

13. The class sought to be represented by the named plaintiffs is the class of all interstate motor carriers whose motor carrier vehicles: (a) are based in jurisdictions other than Pennsylvania; (b) are or will be subject to the Axle Tax of Section 9902 of the Vehicle Code; and (c) are or will be taxed at the rate of $36 per axle.

Factual Background

14. The nature of the interstate transportation services provided by most of the plaintiff class and their affiliates requires them to qualify substantially all of their vehicles for operation in Pennsylvania notwithstanding that in any given year some of those vehicles may never enter into the Commonwealth. Use of the highways of this Commonwealth by a particular interstate motor carrier vehicle during any particular year is largely unpredictable and is subject to factors over which the carrier has no control, such as customer demand, pick-up location and ultimate destination.

15. During the coming year, plaintiff Tri-State's interstate motor carrier vehicles will all be qualified to operate within the Commonwealth, and the Axle Tax required under Section 9902 will be paid for each vehicle, at an initial total cost of $207,000.

16. During the coming year, plaintiff Interstate's interstate motor carrier vehicles will all be qualified to oper-

ate within the Commonwealth, and the Axle Tax required under Section 9902 will be paid for each vehicle, at an initial total cost of $21,780.

Operation Of The Axle Tax For Highway Bridge Improvement

17. The Axle Tax for Highway Bridge Improvement was enacted as Section 3 of Act 234 of the Laws of 1982. Act 234 is attached hereto as Exhibit A and incorporated herein by reference.

18. Act 234 was signed into law by Governor Thornburgh on December 8, 1982, and the Axle Tax provisions thereof become effective on April 1, 1983.

19. Section 9902 imposes an annual tax on all motor carriers in the amount of $36 per axle of each motor carrier vehicle (defined as "every truck, truck tractor or combination having a gross weight or registered weight in excess of 26,000 pounds") operated within the Commonwealth.

20. 75 Pa. C.S. § 9903 requires that this Axle Tax be paid to the Department of Revenue ("Department") at the time of registration of Pennsylvania-based motor carrier vehicles (June 1) or, in the case of non-Pennsylvania-based vehicles, at the time of the issuance of and payment for the vehicle identification marker or permit required by 75 Pa. C.S. § 2102 (April 1). The identification marker is required to demonstrate compliance by non-Pennsylvania carriers with the record-keeping and tax-paying requirements of the Motor Carriers Road Tax Act, 72 P.S. § 2617.1 *et seq.*

21. No registration card or vehicle identification marker will be issued by the Department unless the Axle Tax has been paid, and the card or marker will be prima facie evidence that the Axle Tax has been paid.

22. 75 Pa. C.S. § 9905 provides that the full tax of $36 per axle shall be imposed only after a vehicle has traveled at least 2,000 miles in the Commonwealth.

23. For vehicles traveling less than 2,000 miles in the Commonwealth, a portion of the full $36-per-axle tax may be rebated pursuant to rules and regulations to be promulgated by the Department. Act 234 provides that, upon application by the motor carrier after the close of the preceding year, the Commonwealth will rebate a percentage of the tax equal to a ratio of the miles less than 2,000 operated in the Commonwealth to the minimum 2,000 miles.

24. For example, a motor carrier whose vehicle operated 1,500 miles in the Commonwealth will compute its rebate as follows:

Step 1: $\frac{2{,}000 - 1{,}500}{2{,}000} = .25$

Step 2: $.25 \times \$36 = \$9$ per axle rebate

25. 75 Pa. C.S. § 9906 provides that failure to comply with the Axle Tax subjects the offender to fines up to $500 and/or imprisonment for up to 90 days. These penalties will be administered in addition to and in conjunction with the fines up to $500 and/or imprisonment for up to 90 days which may be imposed for failure to comply with the marker decal provisions of 75 Pa. C.S. § 2102.

26. Pursuant to 75 Pa. C.S. § 2104, as amended by Act 234, employees of defendant Bloom have the authority throughout the Commonwealth to arrest on view, without warrant, the driver of a motor carrier vehicle engaged in any operations without having paid the Axle Tax, and, upon probable cause that such violation has occurred, to search and seize the vehicle and its contents so operated.

The Disparate Impact Of The Axle Tax On Pennsylvania And Non-Pennsylvania-Based Motor Carrier Vehicles

27. Section 1 of Act 234 amends 75 Pa. C.S. § 1916 ("Section 1916") to reduce the existing Pennsylvania annual registration fees for motor carrier vehicles in excess of 26,000 pounds gross vehicle weight as follows:

Weight	Amount Reduced
26,001-40,000	$72
40,001-60,000	108
60,001-73,280	144
73,281-80,000	180

28. The reductions in annual registration fees caused by Act 234 are in multiples of $36 and begin at the weight class where the Axle Tax is first imposed—26,000 pounds.

29. These reductions were intended to and do *exactly offset* the impact of the Axle Tax, in each weight class, upon motor carriers operating motor carrier vehicles which are registered in Pennsylvania.

30. For example, under the annual registration fee schedule set out in Section 1916 for the 1982 registration year, truck tractor and trailer combination registered in Pennsylvania for a maximum weight of 80,000 pounds would pay $1125 for a one-year registration.

31. For the 1983 registration year, that same five-axle combination will pay only $945 under the Section 1916 annual registration fee schedule as amended by Act 234. However, that combination must now also pay $36 per axle for each of its five (5) axles, or a total Axle Tax of $180.

32. The $945 registration fee plus the $180 Axle Tax paid by the motor carrier operating a Pennsylvania-based vehicle will cause it to pay $1125 to register its vehicle in the Commonwealth—exactly the same amount as the registration fee prior to Act 234.

33. The real effect of the above-mentioned reductions in the annual registration fees for Pennsylvania-based motor carrier vehicles is to eliminate any financial effect of the Axle Tax upon those vehicles.

34. That is, the operating cost per mile incurred by Pennsylvania-based motor carrier vehicles during the 1983 registration year (June 1, 1983-May 31, 1984) will remain constant, and they will bear *none* of the burden of the Axle Tax.

35. As a result, the full burden of the Axle Tax will fall upon motor carriers with motor carrier vehicles based in jurisdictions other than Pennsylvania. That burden is very great.

36. For a non-Pennsylvania-based five-axle motor carrier vehicle, operating costs will increase by *$180 per vehicle* as a direct result of the Axle Tax.

37. If that motor carrier vehicle travels 2,000 miles in the Commonwealth, its operating cost will increase by 9 cents per mile as a result of the imposition of the Axle Tax, computed as follows:

$$\frac{\$180 \text{ Axle Tax}}{2{,}000 \text{ miles}} = \$.09 \text{ per mile}$$

38. Assuming a fuel consumption rate of 4.9 miles per gallon for a motor carrier vehicle operating at 80,000 pounds, 9 cents per mile of Axle Tax equates to a 44 cent per gallon fuel tax.

39. Moreover, this same motor carrier vehicle will pay 9 cents per mile to comply with the Pennsylvania Axle Tax no matter how many miles fewer than 2,000 it operates in Pennsylvania. For example, if it operates 1,000 miles in the Commonwealth, its increased cost per mile will be as follows:

Step 1: $\frac{2{,}000 - 1{,}000}{2{,}000} \times \$36 \text{ per axle} = \$18 \text{ per axle rebate}$

Step 2: $18 per axle × 5 axles = $90 rebate

Step 3: $180 Axle Tax − $90 rebate = $90 Axle Tax

Step 4: $\frac{\$90 \text{ Axle Tax}}{1{,}000 \text{ miles}} = \$.09$ per mile

Count I—Discrimination against Interstate Commerce

40. The averments of paragraphs 1-39 are incorporated herein as if fully set forth below.

41. 75 Pa. C.S. § 9907(b) states the purpose of the Axle Tax as follows:

> (b) Purpose of tax.—It is the declared policy of the Commonwealth that the money raised by the tax imposed by this chapter be used, to the greatest extent possible, to provide for the creation of jobs and the rehiring of the unemployed in this Commonwealth.

42. The imposition of an Axle Tax which has a financial impact exclusively upon motor carrier vehicles registered outside of Pennsylvania, for the privilege of using the highways of the Commonwealth in interstate commerce, constitutes invidious and unlawful discrimination against interstate commerce insofar as it: (a) imposes burdens on interstate motor carriers operating non-Pennsylvania-based motor carrier vehicles in order to conduct interstate commerce in Pennsylvania that are not shared by motor carriers operating Pennsylvania-based motor carrier vehicles; and (b) generates the funds required to carry out the purely parochial Pennsylvania purposes of the Act exclusively from non-Pennsylvania carriers.

43. The application of the Axle Tax to all motor carrier vehicles operating in the Commonwealth is purely a pretext to disguise facial discrimination against interstate commerce in that the corresponding decrease in Pennsyl-

vania annual registration fees enacted in Act 234 exactly offset the impact of the Axle Tax on motor carrier vehicles based in Pennsylvania.

44. Under Article I, Section 8 of the United States Constitution, discrimination against interstate commerce, such as by conditioning the right of an interstate motor carrier to utilize the highways of Pennsylvania upon the payment of fees or costs not shared by carriers registered in Pennsylvania, is unlawful.

Count II—Burden upon Interstate Commerce

45. The averments of paragraphs 1-44 are incorporated herein as if fully set forth below.

46. The $36-per-axle tax imposed upon non-Pennsylvania-based motor carrier vehicles wishing to utilize the highways of Pennsylvania in order to conduct interstate commerce constitutes an unlawful burden upon interstate motor carriers because:

(a) It is imposed irrespective of the existence of any substantial nexus between the affected interstate motor carriers and the Commonwealth of Pennsylvania;

(b) It is imposed without any regard or concern for the magnitude of the affected motor carriers' business within the Commonwealth of Pennsylvania or any apportionment based upon the relative magnitude of an affected motor carrier's business within Pennsylvania and the carrier's gross volume of business in all states;

(c) It is facially discriminatory between motor carriers operating Pennsylvania-based motor carrier vehicles and motor carriers operating carrier vehicles based in other jurisdictions;

(d) It is not related to the volume, value or nature of the services provided by the Commonwealth of Pennsylvania to any affected interstate motor carrier; and

(e) It is wholly unrelated to the magnitude or nature of any benefit received by or conferred upon any affected interstate motor carrier by the Commonwealth of Pennsylvania or arising from the operations of an affected motor carrier within the Commonwealth of Pennsylvania.

47. For this reason, the $36-per-axle tax imposed by Section 9902 upon each and every interstate motor carrier vehicle registered beyond the borders of the Commonwealth and wishing to utilize the highways of Pennsylvania in interstate commerce constitutes an unlawful burden upon such commerce under Article I, Section 8 of the United States Constitution.

* * * *

WHEREFORE, plaintiffs pray this Honorable Court:

1. To declare that Section 9902 of Title 75 is unlawful, unconstitutional and void insofar as the Axle Tax it imposes upon interstate motor carrier vehicles registered in jurisdictions other than Pennsylvania as a prerequisite to travel upon the highways of this Commonwealth violates the Commerce Clause, the Privileges and Immunities Clause, the Fourteenth Amendment to the United States Constitution, Article VIII, Section 1 of the Pennsylvania Constitution, and 42 U.S.C. § 1983;

2. To enjoin all enforcement of Section 9902 of Title 75 by defendants and persons within their jurisdiction, authority and control, including the enforcement mechanisms provided in Section 2104 of Title 75;

3. To order defendants immediately to refrain from attempting to collect the Axle Tax from interstate motor carriers for the year commencing April 1, 1983;

4. To order the repayment of all sums already collected by defendants pursuant to the Axle Tax forthwith together with interest thereon from the date of collection; and

5. To grant such other relief as may be deemed appropriate, including costs and attorney's fees under 42 U.S.C. § 1988.

/s/ Frank J. Napolitano, Jr.
ARTHUR R. LITTLETON
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Prior Printer's Nos. 464, 1670 Printer's No. 2248

REPORT OF THE COMMITTEE OF CONFERENCE ON SENATE BILL NO. 457

To the Members of the Senate and House of Representatives:

We, the undersigned, Committee of Conference on the part of the Senate and House of Representatives for the purpose of considering Senate Bill No. 457, entitled: "An act amending Title 75 (vehicles) of the Pennsylvania Consolidated Statutes, further providing for exceptions to vehicle registration and inspection requirements, PROVIDING FOR THE ADMISSIBILITY OF BREATH OR BLOOD TEST REFUSAL AND CHANGING THE PERIOD ALLOWED FOR TEMPORARY PERMITS,"

respectfully submit the following bill as our report:

RICHARD A. TILGHMAN

CLARENCE F. MANBECK

(Committee on the part of the Senate.)

RUDLOPH DININNI

FRED C. NOYE

(Committee on the part of the House of Representatives.)

AN ACT

Amending Title 75 (Vehicles) of the Pennsylvania Consolidated Statutes, deleting a provision prohibiting the deduction of oil company franchise tax in calculating other taxes imposed by the Commonwealth and for the payment of credits, reducing the fee for the issuance of identification markers, providing for the imposition of a new axle tax on certain vehicles and further providing for windshield obstructions.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Sections 1916, 2102, 2104 and 4524 of Title 75, act of November 25, 1970 (P.L. 707, No. 230), known as the Pennsylvania Consolidated Statutes, are amended to read:

§ 1916. Trucks and truck tractors.

(a) General rule.—The annual fee for registration of a truck or truck tractor shall be determined by its registered gross weight or combination weight in pounds according to the following table:

Class	Registered Gross or Combination Weight in Pounds	Fee
1	5,000 or less	$ 39
2	5,001- 7,000	54
3	7,001- 9,000	102
4	9,001-11,000	132
5	11,001-14,000	162
6	14,001-17,000	192
7	17,001-21,000	237
8	21,001-26,000	270
9	26,001-30,000	[315] *243*
10	30,001-33,000	[378] *306*
11	33,001-36,000	[414] *342*
12	36,001-40,000	[438] *366*

Class	Weight in Pounds	Fee
13	40,001-44,000	[465] *357*
14	44,001-48,000	[501] *393*
15	48,001-52,000	[552] *444*
16	52,001-56,000	[588] *480*
17	56,001-60,000	[666] *558*
18	60,001-64,000	[741] *597*
19	64,001-68,000	[.77] *633*
20	68,001-73,280	[834] *690*
21	73,281-76,000	[1065] *885*
22	76,001-78,000	[1089] *909*
23	78,001-78,500	[1101] *921*
24	78,501-79,000	[1113] *933*
25	79,001-80,000	[1125] *945*

* * * *

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 267 C.D. 1983

CLASS ACTION

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,
Petitioners

v.

ROBERT K. BLOOM, Secretary of the Department of Revenue, et al.,
Respondents

ANSWER AND NEW MATTER

ANSWER

1-2. ADMITTED only insofar as these paragraphs aver that the axle tax will take effect on April 1, 1983, and insofar as they purport to characterize the nature of the instant action. LEGAL CONCLUSIONS herein require NO RESPONSE.

3. JURISDICTIONAL STATEMENT requiring NO RESPONSE.

4-8. DENIED. Respondents, after reasonable investigation, are without knowledge or information sufficient to form a belief as to the truth of the averments in these paragraphs and proof thereof is demanded.

9. DENIED. Respondents, after reasonable investigation, are without knowledge or information sufficient to form a belief as to the truth of the averments in this paragraph and proof thereof is demanded. LEGAL CONCLUSIONS herein require NO RESPONSE.

10. ADMITTED only insofar as it is averred that the individuals named are Pennsylvania citizens, and that Leroy S. Zimmerman and Daniel F. Dunn hold the respective positions stated. DENIED that Robert K. Bloom is Secretary of the Department of Revenue. To the contrary, the Acting Secretary of the Department of Revenue is James I. Scheiner. The remaining averments state LEGAL CONCLUSIONS as to which NO RESPONSE is required.

* * * *

13. ADMITTED only insofar as this paragraph purports to characterize the class sought to be represented.

14-16. DENIED. Respondents, after reasonable investigation, are without knowledge or information sufficient to form a belief as to the truth of these averments, and proof thereof is demanded.

17. ADMITTED.

18. ADMITTED.

19. ADMITTED that Section 9902 imposes an annual tax in the amount of $36 per axle on every truck, truck tractor or combination having a gross weight or registered gross weight in excess of 26,000 pounds operated on the Commonwealth's highways.

20. ADMITTED that 75 Pa. C.S. § 9903 requires that the axle tax be paid to the Department of Revenue at the time a motor carrier applies for vehicle registration or for the issuance of an identification marker or permit pursuant to 75 Pa. C.S. § 2102. All remaining averments state LEGAL CONCLUSIONS as to which NO RESPONSE is required.

21. ADMITTED.

22. ADMITTED that under 75 Pa. C.S. § 9905 the full axle tax applies only to vehicles which travel at least 2,000 miles annually in the Commonwealth.

23. ADMITTED that, for vehicles traveling less than 2,000 miles annually in the Commonwealth, a portion of the full axle tax will be rebated upon application to the Department of Revenue; that rebate applications are to be accompanied by such supporting data as may be required by Department of Revenue regulations; and that upon receipt for such applications, the Commonwealth will issue axle tax rebates in accordance with the following formula:

$$\frac{2{,}000 - \text{actual miles travelled}}{2{,}000} \times \text{axle tax paid} = \text{rebate.}$$

All remaining averments state LEGAL CONCLUSIONS as to which NO RESPONSE is required.

24. ADMITTED.

25. ADMITTED that 75 Pa. C.S. § 9906 provides maximum penalties of a $500 fine and/or 90-day imprisonment for willful failure to pay the axle tax; that there are maximum penalties of a $500 fine and/or 90-day imprisonment for willful violation of the identification marker requirement; and that penalties for willful failure to pay the axle tax are imposed in addition to any penalties which may be imposed for willful failure to obtain and display an identification marker.

26. ADMITTED only as to such employees of the Department of Revenue (not "defendant Bloom") as are designated as special investigators, and who carry identification indicating such capacity. 75 Pa. C.S. § 2104. To the extent that this paragraph refers to any other employees of the Department of Revenue, it is DENIED.

27-28. ADMITTED.

29. DENIED. To the contrary, registration fee reductions do not in every case equal axle tax payments. For example, pursuant to 75 Pa. C.S. § 4941(c), a truck lawfully operating on Pennsylvania highways with a gross

weight greater than 58,400 pounds must have at least 4 axles. The axle tax for a 4-axle truck is $144 (4 x $36). However, the registration fee for a truck with gross weight greater than 58,400 pounds, and less than or equal to 60,000 pounds, has been reduced by only $108. 75 Pa. C.S. § 1916. Further, apportioned-registered vehicles based in Pennsylvania pay only a percentage of the Pennsylvania registration fees (based on the proportion of their total miles which they travel in Pennsylvania), and so benefit from only a percentage of the registration fee reductions; yet these vehicles are subject to the full axle tax (assuming they travel at least 2,000 miles annually in the Commonwealth and have gross weight greater than 26,000 pounds).

30. ADMITTED.

31. ADMITTED only as to a combination with registered gross weight of 80,000 pounds which has five axles. To the extent that petitioners contend that combinations with registered gross weight of 80,000 pounds necessarily have five axles, this paragraph is DENIED. To the contrary, registered gross weight does not determine maximum number of axles.

32. DENIED that an 80,000 pound 5-axle combination is subject to an $1125 registration fee. To the contrary, the registration fee for this type combination is $945, the axle tax $180.

33. DENIED. To the contrary, operators of both Pennsylvania-based and non-Pennsylvania-based trucks, truck tractors, or combinations with gross weight in excess of 26,000 pounds are required to pay the axle tax. The axle tax clearly has a real financial effect upon operators of vehicles based in Pennsylvania.

34. DENIED. Respondents, after reasonable investigation, are without knowledge or information sufficient to form a belief as to the truth of the averment that the

operating cost per mile incurred by Pennsylvania-based motor carrier vehicles during the 1983 registration year will remain constant, and proof thereof is demanded. DENIED that Pennsylvania-based motor carrier vehicles will bear none of the burden of the axle tax. To the contrary, operators of both Pennsylvania-based and non-Pennsylvania-based trucks, truck tractors, or combinations with gross weight in excess of 26,000 pounds are required to pay the axle tax. Any LEGAL CONCLUSIONS intended to be derived herefrom require NO RESPONSE.

35. DENIED. To the contrary, operators of both Pennsylvania-based and non-Pennsylvania-based trucks, truck tractors, or combinations with gross weight in excess of 26,000 pounds are required to pay the axle tax. Respondents are without knowledge or information sufficient to form a belief as to the truth of the averment that the "burden" of the axle tax is "very great", and proof thereof is demanded. Any LEGAL CONCLUSIONS intended to be derived herefrom require NO RESPONSE.

36-37. DENIED. The axle tax for a five-axle motor carrier vehicle will in fact be $180; however, imposition of the axle tax will not necessarily increase net "operating costs" by $180. Axle tax revenues will be used for bridge rehabilitation, replacement and removal projects on state, county and municipal highways. 75 Pa.C.S. §§ 9907(a), 9908. These bridge projects will benefit the operators of vehicles subject to the axle tax.

Proof of the averments in these paragraphs is demanded.

38. DENIED. The meaning of this paragraph is unclear; respondents cannot answer it absent clarification.

39. DENIED. Imposition of the axle tax will not necessarily increase net costs per mile by 9¢. *See*, ¶¶ 36-

37, *supra*. Proof of the averments in this paragraph is demanded.

40. The answers to paragraphs 1-39 are incorporated herein as if fully set forth.

41. ADMITTED that this paragraph quotes accurately a portion of 75 Pa.C.S. § 9907(b). By way of further response, the remainder of § 9907(b) states as follows:

> In order to reach this goal, firms with Pennsylvania-based facilities shall be actively solicited to make bids on contracts to furnish products and materials, including, but not limited to, steel and steel products, *to be used in the projects funded through the Highway Bridge Improvement Restricted Account.*

(Emphasis added.) Any LEGAL CONCLUSIONS intended to be derived herefrom require NO RESPONSE.

42. DENIED. States LEGAL CONCLUSIONS as to which NO RESPONSE is required.

43. ADMITTED only insofar as it is averred that the axle tax applies to all motor carrier vehicles operating in the Commonwealth, and that Act 234 decreased certain annual registration fees. DENIED that the axle tax has no impact on motor carrier vehicles based in Pennsylvania. To the contrary, operators of both Pennsylvania-based and non-Pennsylvania-based trucks, truck tractors, or combinations with gross weight in excess of 26,000 pounds are required to pay the axle tax. Further DENIED that Act 234's registration fee reductions equal axle tax payments in all cases. *See*, ¶¶ 29, 31, *supra*. All remaining averments state LEGAL CONCLUSIONS as to which NO RESPONSE is required.

44. DENIED. States LEGAL CONCLUSIONS as to which NO RESPONSE is required.

45. The answers to paragraphs 1-44 are incorporated herein as if fully set forth.

46-47. DENIED. State LEGAL CONCLUSIONS as to which NO RESPONSE is required.

NEW MATTER

57. The axle tax is imposed equally upon Pennsylvania-registered and non-Pennsylvaia-registered vehicles which are subject to the Axle Tax for Highway Bridge Improvement Act.

58. The axle tax applies only to trucks, truck tractors, or combinations with gross-weight greater than 26,000 pounds, which travel on Pennsylvania highways.

59. The full axle tax applies only to vehicles which travel at least 2,000 miles annually in the Commonwealth.

60. The axle tax is paid exclusively into the Highway Bridge Improvement Restricted Account within the Motor License Fund. 75 Pa. C.S. § 9907(a).

61. The Highway Bridge Improvement Restricted Account will be used for bridge rehabilitation, replacement and removal projects on state, county and municipal highways. 75 Pa. C.S. § 9908.

62. Both Pennsylvania-based and non-Pennsylvania-based vehicles using Pennsylvania highways will benefit from these bridge rehabilitation, replacement and removal projects.

63. The weight at which a given Pennsylvania-based vehicle or combination registers, pursuant to 75 Pa.C.S. § 1916, does not determine the maximum number of axles which that vehicle or combination will have.

64. Pennsylvania is a party to the International Registration Plan. (IRP).

65. Vehicles based in IRP-member states which travel in Pennsylvania pay to the Commonwealth an apportioned registration fee based on the following formula:

$$\frac{\text{miles travelled in PA.}}{\text{total miles travelled}} \times \text{PA. registration fee} = \text{apportioned registration fee}$$

66. Motor carriers which operate on Pennsylvania highways vehicles based in IRP-member states pay lower apportioned registration fees to the Commonwealth as a result of Act 234's registration fee reductions.

67. Motor carriers operating apportioned-registered vehicles based in Pennsylvania pay only a percentage of Pennsylvania registration fees for those vehicles, according to the formula set out in ¶ 65, *supra*.

68. Operators of apportioned-registered vehicles based in Pennsylvania therefore benefit from only a percentage of Act 234's registration fee reductions.

69. Apportioned-registered vehicles based in Pennsylvania are, however, subject to the full axle tax (assuming they travel at least 2,000 miles annually in the Commonwealth and have gross weight greater than 26,000 pounds).

70. The axle tax imposed on a given Pennsylvania-based vehicle or combination may exceed in amount the registration fee reduction which applies to that vehicle or combination.

71. Corporate petitioners lack standing to assert a claim under the Privileges and Immunities Clause.

WHEREFORE, respondents respectfully request that the instant complaint be dismissed with prejudice.

Respectfully submitted,

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Attorney General

By: /s/ Maura A. Johnston
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Date: March 1, 1983

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 267 C.D. 1983

CLASS ACTION

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners,

v.

ROBERT K. BLOOM, Secretary of the
Department of Revenue, *et al.*,
Respondents.

PETITIONERS' REPLY TO RESPONDENTS' NEW MATTER

Petitioners, American Trucking Associations, Inc., et al., reply to respondents' New Matter, in accordance with the paragraph numbers thereof, as follows:

57. Denied as stated. It is admitted that Section 9902 purports to impose the Axle Tax equally upon all vehicles regardless of their registration jurisdiction. However, Section 1916 negates the imposition of the Axle Tax upon Pennsylvania-based vehicles. As demonstrated in paragraphs 27-39 of the Petition for Review, the burden of the Axle Tax imposed upon interstate motor carriers operating non-Pennsylvania-based motor carrier vehicles is not shared by motor carriers operating Pennsylvania-based motor carrier vehicles.

58-60. Admitted.

61. Admitted in part and denied in part. It is admitted that 75 Pa. C.S. § 9908 appropriates funds from the Highway Bridge Improvement Restricted Account for

certain ennumerated purposes. However, respondents' interpretation of the provisions of this section is denied in that it constitutes a conclusion of law to which no response is required.

62. Denied as stated. It is admitted that vehicles registered in all jurisdictions may benefit from the bridge rehabilitation, replacement and removal projects of Section 9908. However, Pennsylvania-based and non-Pennsylvania-based vehicles will not share that benefit equally. On average, non-Pennsylvania-based motor carrier vehicles travel a much smaller percentage of their miles on the roads of the Commonwealth. In addition, almost half of the bridges targeted for improvement under Section 9908 are located in rural areas and on little-used roads which receive no federal highway aid funds.

63. Denied as stated. While it is true that the weight class of any vehicle or combination does not limit the maximum number of axles which that vehicle or combination will have, the minimum number of axles and the registration weight of motor carrier vehicles are directly related. The reductions in Section 1916 registration fee amounts effected by Act 234 reflect the average number of axles that a typical vehicle in any given weight class can reasonably be expected to have. That is, the typical motor carrier vehicles registering for a maximum weight of 26,001-40,000 pounds must have two axles; motor carrier vehicles registering for a maximum weight of 40,001-60,000 pounds must have three axles; motor carrier vehicles registering for a maximum weight of 60,001-73,280 pounds must have four axles; and motor carrier vehicles registering for maximum weights in excess of 73,281 typically have five axles.

64-68. Admitted in part and denied in part. It is admitted that Pennsylvania is now a member jurisdiction of the IRP. However, respondents' interpretations of the provisions of the IRP are denied. The IRP, being a writ-

ten agreement among the various member jurisdictions, speaks for itself. By way of further answer, the participation of Pennsylvania in the IRP is an executive decision—not law—and it is therefore subject to change by the Pennsylvania Department of Transportation at any time without consulting the legislature. Such administrative regulations are ineffective to cure a patently parochial statute and irrelevant to its constitutionality.

69. Denied as stated. Motor carrier vehicles based in all jurisditcions which are in excess of 26,000 pounds gross vehicle weight and which travel at least 2,000 miles in the Commonwealth are subject to the payment of the full Axle Tax. However, Pennsylvania-based motor carrier vehicles, regardless of whether they apportion registration, are relieved of some portion of the burden of the Axle Tax.

70. Denied as stated. While the scenario alleged in this paragraph is possible, for the reasons stated in response to the allegations of paragraph 63 above, on average the registration fee reduction of Act 234 will exactly offset the Axle Tax imposed upon Pennsylvania-based motor carrier vehicles.

71. Denied. Petitioners are advised that the allegation of this paragraph constitutes conclusions of law to which no response is required.

/s/ F. J. Napolitano, Jr.
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IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 267 C.D. 1983

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners

vs.

ROBERT K. BLOOM, Secretary of the
Department of Revenue, *et al.*,
Respondents

STIPULATION

Petitioners commenced this action to have Section 9902 of the Axle Tax for Highway Bridge Improvement Act, 75 Pa.C.S. §§ 9901-9909 ("Axle Tax"), declared unconstitutional and all enforcement of it enjoined.

Section 9902 requires that motor carriers pay an annual tax in the amount of $36 per axle on certain motor carrier vehicles operated into, from, or through Pennsylvania. 75 Pa.C.S. § 9903 requires that this tax be paid at the time of application for registration, for Pennsylvania-based vehicles (June 1), or, for non-Pennsylvania-based vehicles, at the time of application for the identification marker or permit required by 75 Pa.C.S. § 2102 (April 1). Affected motor carriers operating non-Pennsylvania-based vehicles within the Commonwealth are presently in the process of paying the Axle Tax for the year beginning April 1, 1983.

In an effort to have the Court establish an escrow or similar type arrangement to safeguard the Axle Tax payments being made by affected motor carriers pending the outcome of this suit, petitioners filed a Motion for Special Injunction subsequent to filing their Petition for Review.

To avoid the time and expense of a hearing on the Motion, however, petitioners and respondents have

reached the following Stipulation concerning the disposition of the payments in question:

1. Respondents agree that, if petitioners prevail upon the merits of their Petition for Review, pursuant to 72 P.S. § 503, all affected motor carriers will be entitled to receive a refund of Axle Tax payments for the year beginning April 1, 1983. Further, respondents agree that the motor carriers will receive a refund of such payments under the terms set forth below.

2. Within ninety (90) days after a final decision on the merits in which Section 9902 shall have been declared unconstitutional or its enforcement enjoined and all appeals have been exhausted or abandoned, respondents shall refund all Axle Tax payments for the year beginning April 1, 1983. If, after (80) days from the date of the final decision, respondents reasonably believe for reasons not foreseeable at the time of this Stipulation that they will not be able to complete all refunds within the ninety (90) day period, they shall have the right to apply to the Commonwealth Court for an appropriate modification of this paragraph.

3. Respondents agree that, in the event refunds are due, they will identify and transmit the correct amount of refund to each affected motor carrier. Respondents further agree that no affected motor carrier will be required to proceed before the Board of Finance and Revenue or otherwise come forward with any type of proof in order to be entitled to such refund.

4. Respondents further agree that, in the event refunds are made, they will provide to Douglas Hughes, in care of American Trucking Associations, Inc., a listing of the motor carriers to which refunds have been issued. This listing will indicate the dollar amount of the refund issued to each motor carrier.

5. If for any reason a motor carrier entitled to receive an Axle Tax refund for the year beginning April

1, 1983 does not receive a refund in the correct amount from respondents pursuant to paragraph 3, the motor carrier, upon submitting reasonable proof of such entitlement in writing addressed to Maura A. Johnston, Esquire, Office of Attorney General, 15th Floor, Strawberry Square, Harrisburg, PA 17120, shall forthwith receive the proper refund. Notwithstanding the alternate procedure described in this paragraph, it is the intent of this Stipulation that refunds will be made under the procedure set forth in paragraph 3.

6. Petitioners and respondents agree to defer the question of whether affected motor carriers are entitled to receive interest upon any payments refunded to them. Affected motor carriers shall recover from respondents such interest upon the amounts refunded to them as the law may provide at the time the refunds are made.

7. Nothing in this Stipulation shall be construed to relieve motor carriers from complying with the requirements of Section 9902 or from payment of the Axle Tax, as provided for in the Axle Tax for Highway Bridge Improvement Act, 75 Pa.C.S. §§ 9901-9909.

8. This Stipulation relates solely to a procedure for refunds if petitioners ultimately prevail on their claims and neither petitioners nor respondents shall, by virtue of having entered into this Stipulation, be deemed to have waived any claim, defense or position regarding the merits of this action.

9. In consideration of the covenants and agreements above, petitioners withdraw the Motion for Special Injunction previously filed.

Attorney for Petitioners

/s/ Maura A. Johnston
Attorney for Respondents

Date: February 9, 1983

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 267 C.D. 1983

CIVIL ACTION

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners,

v.

ROBERT K. BLOOM, Secretary of the
Department of Revenue, *et al.*,
Respondents.

ORDER FOR CLASS CERTIFICATION PURSUANT TO PA. R. CIV. P. 1710 AND 1711

AND NOW, this 12th day of December, 1983, upon consideration of petitioners' motion for class certification and respondents' answer thereto, it is

ORDERED AND DECREED that:

1. This action shall be certified to proceed as a class action.

2. The class to be represented by the named petitioners in connection with their Petition for Review is certified to consist of all interstate carriers who own motor carrier vehicles which are registered outside of Pennsylvania and who are now or may in the future become subject to the Axle Tax of Section 9902 of the Vehicle Code on account of their operation of such motor carrier vehicles in Pennsylvania.

3. The subclass to be represented by the named petitioners in connection with their Petition for Review is

certified to consist of all interstate carriers who own motor carrier vehicles which are registered in any of the states or provinces which are not member jurisdictions of the International Registration Plan and who are now or may in the future become subject to the Axle Tax of Section 9902 of the Vehicle Code on account of their operation of such motor carrier vehicles in Pennsylvania.

4. Every member of the class and/or subclass shall be included in the class and/or subclass unless such member files of record a written election to be excluded from the class and/or subclass within thirty (30) days of publication of notice of this action pursuant to Pa. R. Civ. P. 1712.

/s/ Williams, Jr.

AFFIDAVIT

[In Support of Respondents' Motion for Summary Judgment]

I, ARLEE T. RENO, state that the following facts are true and correct to my personal knowledge.

1. I am employed by System Design Concepts, Inc. (Sydec), a leading expert consulting firm in the area of highway taxation and finance. I hold the position of Executive Vice President. I have held this position since 1981 and have been employed by System Design Concepts, Inc., since June 1970.

2. During the last fourteen years I have conducted numerous studies and analyses of highway taxation and finance including in-depth studies in relation to interstate and intrastate trucking. I have conducted detailed analyses of such topics for agencies such as the National Academy of Sciences, the Federal Highway Administration, and the American Association of State Highway Officials. A resume of my experience is attached as Appendix R-1.[1]

3. All states, including Pennsylvania, require trucks based in their state to register and pay a fee for registration.[2] Pennsylvania's registration fees are based upon gross weight and there are twenty-five weight classes under which a truck may register. The maximum allowed weight for registration is 80,000 pounds.

4. Trucks are required to be duly registered in either Pennsylvania or another state in order to travel in Pennsylvania. Pennsylvania has state-by-state reci-

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[1] All appendices referred to in, and attached to, this Affidavit are incorporated in the Affidavit as if fully set forth. This includes all exhibits within those appendices. Unless otherwise stated, the facts set forth in those appendices are known to me personally.

[2] A summary of the types of highway user fees imposed by states is attached as Appendix R-2.

procity agreements with twenty-one states and the District of Columbia to allow duly registered trucks from those jurisdictions to use Pennsylvania's roads without payment of Pennsylvania's registration fees. Data from the Commonwealth of Pennsylvania Department of Revenue indicate that the trucks of carriers located in states with which Pennsylvania has reciprocity agreements traveled over 900 million vehicle miles in Pennsylvania.[1]

5. Pennsylvania belongs to a multi-state agreement called the International Registration Plan (IRP), which includes twenty-seven other states plus the province of Alberta, Canada. Trucks registering in any of these states pay an apportioned registration fee to each of the other states in the IRP based upon the proportion of miles of travel in those states. The mileage and fees due from each carrier are calculated on the basis of the carrier's total fleet rather than for each individual truck. Data from the Commonwealth of Pennsylvania Department of Revenue indicate that the trucks of carriers located in other IRP member states traveled over 500 million vehicle miles in Pennsylvania.[2]

6. None of the states bordering Pennsylvania (New Jersey, New York, Ohio, West Virginia, Maryland, and Delaware) belongs to the IRP. Therefore, if a truck is registered in any of these bordering states, none of its registration fees accrue to Pennsylvania no matter how many miles are traveled in Pennsylvania. The same is true for trucks registered in those other jurisdictions with which Pennsylvania has reciprocity agreements for interstate travel.

7. Pennsylvania and thirty-nine other states collect fuel usage taxes, whereby carriers engaged in interstate

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[1] See Affidavit of Michele Gross ("Gross Affidavit"), paragraph 6.

[2] Gross Affidavit, paragraph 6.

travel are required to pay state taxes on fuel consumed within the state, even though the fuel may have been put into a truck's fuel tanks outside the state boundaries. These fuel taxes are collected on this basis because trucks engaged in interstate commerce can travel long distances without refueling, and thus could avoid buying fuel in a particular state if they so desired. These taxes are collected from all carriers no matter where registered.

8. Interstate carriers operating in Pennsylvania report their miles traveled in Pennsylvania and their total miles traveled so that the fuel consumed by the carrier can be apportioned to Pennsylvania and the other states in which the carrier traveled. The carrier then pays each state the fuel taxes due on the fuel consumed within that state at the state's applicable rate of taxation for the fuel.

9. Some states also collect usage fees based upon a carrier's miles of travel within the state and the weight of the vehicle(s) doing the travel. The types of usage fees levied by particular states include fees based upon registered weight and distance, fees based upon loaded weight and distance, and fees based upon number of axles and distance. These taxes, like Pennsylvania's axle tax, are collected from all carriers no matter where registered.

10. Some states have levied "retaliatory" taxes on trucks registered in other states which have usage or other types of fees. A retaliatory tax is usually a mirror image tax collected only on vehicles registered in the state being retaliated against. Eight states currently impose, or have stated an intention to retaliate against Pennsylvania's axle tax.

11. As of July 1984, Pennsylvania's registration fees for the large trucks engaged in interstate travel were higher than those of the six bordering states and higher than the national average.

12. On average, tractor-semitrailers registered at 78,000 pounds in the twenty-one states with which Pennsylvania has reciprocity paid registration fees of $688.60 as of February, 1984, according to the American Trucking Associations. This was $267.40 less in registration fees than the same tractor-semitrailer would pay in Pennsylvania. Thus, those tractor-semitrailers registered in Pennsylvania pay $267.40 more in total fees to operate in Pennsylvania than the average for the same tractor-semitrailer in reciprocity states. All trucks registered in reciprocity states pay the Pennsylvania axle tax on the same basis as similar trucks registered in Pennsylvania.[1]

    For trucks registered in member states of the International Registration Plan, proportional registration fees are paid to each member state based upon the percentage of miles in each state. IRP members, including Pennsylvania, thus share registration fees on an equitable basis. All IRP registered trucks which travel in Pennsylvania pay the Pennsylvania axle tax on an equal basis, whether registered in Pennsylvania or in other IRP member states.

13. After Pennsylvania raised its registration fees in 1980, the proportion of truck-tractors registered in Pennsylvania compared to the total in Pennsylvania and the surrounding states dropped substantially according to the Federal Highway Administration (FHWA).[2] The proportion of truck-tractors registered in Pennsylvania compared to total truck-tractor registrations in Pennsylvania and the six surrounding states was 28 percent in both 1979 and 1980, but dropped to 22 percent in 1981.

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[1] Appendix R-3 provides a comparison of fees for Pennsylvania trucks compared to fees for trucks registered in reciprocity states.

[2] Appendix R-4 provides a summary of the impacts of registration fee increases on Pennsylvania's registrations of heavy trucks.

14. While Pennsylvania's registration figures for 1984 are not complete, preliminary data do not show an increase for heavy trucks between 1983 and 1984. Perhaps because of the retaliation of several states against the Pennsylvania axle tax, Pennsylvania's registrations may not be as high.

15. Another reason that Pennsylvania's registrations of heavy truck-tractors may not increase after 1983 is that Pennsylvania's registration fees remain higher than those of the six bordering states. The registration fees in July 1984 for 80,000 pound tractor-semitrailer combinations were $972 in Pennsylvania, and ranged from $404 to $860 in the bordering states. Prior to the 1983 decrease in registration fees, Pennsylvania's registration fee for an 80,000 pound tractor-semitrailer was $292 to $748 higher than the registration fees for a similar tractor-semitrailer in the six surrounding states.

16. An 80,000 pound tractor-semitrailer registered in Pennsylvania and traveling in Pennsylvania and its six bordering states would pay a higher total registration fee plus axle tax than the same tractor-semitrailer would if registered in any of the border states and traveling the same exact miles and routes in these states. In five of the six bordering states, it is cheaper to pay that state's registration fee plus the Pennsylvania axle tax than to pay the Pennsylvania registration fee alone.

17. The historical evidence on the relative shift in registrations of truck-tractors from Pennsylvania to other states after Pennsylvania's registration fees were raised confirms the expectation that a further increase in registration fees would cause trucks to register in states other than Pennsylavnia. These trucks, by shifting their registrations to states with which Pennsylvania has reciprocity agreements,

would pay lower registration fees, none of which would accrue to Pennsylvania to repair and maintain the roads.

18. The existence of a large number of carriers who are able to shift their registrations from Pennsylvania to neighboring states or other states means that registration fees themselves cannot be relied upon to reach all trucks making substantial use of Pennsylvania's highways and bridges.

19. All trucks operating in Pennsylvania, whether registered in Pennsylvania or out-of-state, pay the same fuel usage tax based upon gallons of fuel consumed in Pennsylvania. Therefore, a truck which pays less in registration fees for the same travel in Pennsylvania also pays less in total fees (registration plus fuel taxes) for the same travel in Pennsylvania.

20. Trucks engaged in interstate travel in Pennsylvania travel extensive miles on primary, secondary, and local routes in addition to their travel on the Interstate highways. An estimate prepared by Sydec for the U.S. DOT's Truck Size and Weight Study indicated that only 36 percent of travel by tractor-semitrailer trucks in Pennsylvania was on the Interstate System, while 64 percent was on the principal arterial, collector, and local roads. In addition, trucks engaged in interstate travel need access to origins and destinations on principal arterials, collector, and local roads, even in instances in which most of their travel is on Interstate highways.

21. All states including Pennsylvania have a designated national network of routes available to vehicles (large trucks of the maximum allowed dimensions and weight) authorized by the provisions of the Surface Transportation Assistance Act of 1982 (STAA) (Public Law 97-424, 96 Stat. 2097, as amended by Public Law 98-17, 97 Stat. 59). Pennsylvania has

44 major routes on this network and has established a substantial number of access routes to and from this network.[1] According to Chapter I of Title 23, Code of Federal Regulations, Part 658, "all States must allow vehicles with dimensions authorized by the STAA reasonable access between the National Network described in the regulation and terminals, and facilities for food, fuel, repairs, and rest." Appendix R-5 documents the use of, and necessity for the use of principal primary, secondary, and local routes by trucks engaged in interstate commerce.

/s/ Arlee T. Reno
ARLEE T. RENO

Commonwealth of Massachusetts
Barnstable, ss.

Sworn to and subscribed before
me this 20th day of August, 1984.

/s/ Gail L. Emerald
GAIL L. EMERALD
Notary Public

My commission expires: May 21, 1987

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[1] See also Affidavit of Warren Kone, paragraphs 3-5.

APPENDIX R-2

TYPES OF HIGHWAY USER FEES

Registration Fees

All states collect fees for the registration of trucks based within their state. Registration is required in each state for interstate truck operators who wish to operate within that state unless there is an agreement between the respective states where the vehicle is registered and the state in which it wishes to operate, or unless a temporary permit is acquired for a fee.

Registration fees and the basis on which they are collected vary widely from state to state. A majority of the states rely upon the declared gross weight of the truck or combination as the basis for registration, while eight U.S. jurisdictions (including the District of Columbia) set fees on the basis of unladen weight. A few have more complicated fee structures that include age, number of axles, or load capacity. Fee schedules vary enormously among the states, with no common basis for either weight groupings or the rates applied to the vehicles of a particular weight.

The two types of most commonly used mechanisms which allow interstate operations of trucks are bilateral agreements between two states or multi-state agreements open to all states who wish to join. The simplest form of agreement between the states is reciprocity: if a vehicle is registered properly in one state, it is allowed to use the highways of another state without the payment of an additional fee and without preparing a report which enables the states to split the registration fee on a proportional basis. Another procedure which involves a low level of cooperation among the states is the issuance of temporary trip permits by the state which the operator is traversing. No involvement by the base state is neces-

sary for the other state to issue the temporary trip permit. Both reciprocity and the use of permits allow the carrier to avoid paying duplicative full registration fees to each of the states in which it operates.

Pennsylvania grants full reciprocity for registration fee purposes to vehicles registered in:

Alaska
California
Connecticut
*Delaware
District of Columbia
Florida
Georgia
Indiana
Maine
*Maryland
Massachusetts
Nevada
New Hampshire
*New Jersey
New Mexico
*New York
*Ohio
Rhode Island
South Carolina
Vermont
Washington
*West Virginia
British Columbia (Canada)
Manitoba (Canada)
New Brunswick (Canada)
Nova Scotia (Canada)
Ontario (Canada)
Quebec (Canada)

*Denotes bordering state

Thus, Pennsylnavia has reciprocity with all of its bordering states. The implication of this for Pennsylvania's revenues from registration fees is that if a Penn-

sylvania-based carrier moves its base and its registrations to one of these bordering states, the carrier would then pay registration fees only to that bordering state. This would be true even if the carrier continued to travel the same miles in Pennsylvania, and the same miles in the bordering state, as it did before changing its base state of registration. Carriers based in states governed by reciprocity do not report their mileage in Pennsylvania or their total mileage in all states for registration purposes.

The disadvantage of reciprocity from the point of view of the state granting reciprocity is that more truck travel by out-of-state carriers may occur on its roads than is reflected in the total registration fees it collects from carriers registered in the state. This is particularly the case for large sparsely populated states or states such as Pennsylvania along major travel corridors, where the level of travel by vehicles from out of state may be very high.

Permits

Temporary permits may also be used by a state to allow travel by trucks which would otherwise not be allowed to enter the state. The issuance of temporary permits requires a flexible permit issuing process if it is to be convenient for the carriers, many of whom may not be able to plan their travel very far in advance.

Multi-State Registration Agreements

Three major mechanisms provide for multi-state agreements with regard to registrations: the International Registration Plan (IRP), the Uniform Vehicle Registration Proration and Reciprocity Agreement (UPRA), and the Multistate Reciprocity Agreement (MRA).

These multi-state agreements have evolved over time as interstate truck travel became more complex and more

national in scope. At first, states had no agreements, and later, state-by-state reciprocity agreements were adopted. The Multistate Reciprocity Agreement was begun in 1948, the Uniform Vehicle Registration Proration and Reciprocity Agreement was begun in 1956, and the International Registration Plan was begun in 1973. Each represented a successively higher degree of cooperation among the member states and member Canadian provinces.

International Registration Plan

The International Registration Plan (IRP), of which Pennsylvania and twenty-seven other states are members, is now the most widely used cooperative mechanism for collecting registration revenues from interstate motor carriers and distributing them among the member states and Canadian provinces. When a jurisdiction joins IRP, the IRP agreement supersedes previous bi-state and multi-state agreements covering the same topics. The distinguishing features of the IRP are base state registration and auditing, one license plate, and one Cab Card showing IRP registration.

Under the IRP, proportional registration fees are paid to each IRP state based upon the percentage of miles driven in each state by each motor carrier. Fees due each state are sometimes calculated by the base state and sometimes by the state where they are due, depending on the complexity of the registration schedule in the state where fees are due.

IRP forms include:

- Original Application Schedule A, listing vehicle and ownership information (license plate number, VIN, weight, fuel type, price, owner, etc.)
- Original Mileage Schedule Recap Sheet, listing mileage and percent of mileage in each jurisdiction (50 states,

District of Columbia, 12 Canadian provinces, and Mexico), and identifying type of operation

- Supplemental Application Schedule C (additions and deletions to Schedule A)
- Supplemental Recap Sheet (for each jurisdiction)
- Registration Weight Schedule E (weight apportioned in each jurisdiction for each vehicle)
- Uniform Transmittal Notice Schedule F (transmits copies of applications from base state to other states)
- Declaration of Estimated Miles Schedule G (estimate of first year miles by state for new routes)

The operator receives an IRP apportioned Cab Card showing the weight, base state, and other states in which the vehicle mileage has been apportioned. The Cab Card is the IRP identification to be carried on the vehicle. The IRP requires reporting of mileage traveled by registered weight and state for the purpose of calculating registration fees due to each jurisdiction. The IRP provides that an acceptable source document to verify fleet mileage is some type of "Individual Vehicle Mileage Record" (IVMR), which shows trip-by-trip mileage by route and jurisdiction for each vehicle in the operator's fleet. An audit might review a sample of some months of an operator's IVMRs in order to verify the total mileage and the distributed mileage reported to the IRP base state.

The IVMRs thus provide the basic information necessary for the auditing of an IRP registration, motor carrier fuel use taxes, or a weight-distance tax, except that they do not include information on trips covered by trip permits, nor, of course, does the IRP cover all states. The operator is assessed registration fees for 100 percent of mileage. In most IRP states including Pennsylvania, the base state registration fee is applied to that portion of the mileage accumulated in non-IRP states.

Uniform Vehicle Registration Proration and Reciprocity Agreement

The UPRA is a predecessor agreement which has been superseded by IRP in most jurisdictions. UPRA applies among the states of New Mexico, Nevada, California, and Washington, and the Province of British Columbia. UPRA also applies between these jurisdictions and the 17 jurisdictions which were members of UPRA and have since joined IRP (Alaska, Alberta, Arizona, Colorado, Idaho, Illinois, Iowa, Kansas, Minnesota, Missouri, Montana, Nebraska, North Dakota, Oregon, South Dakota, Utah, and Wyoming). The distinguishing characteristic of UPRA is that it requires registration in each state, although fees are prorated based upon mileage. A base license plate is required and additional stickers from other states are affixed to a plate. Pennsylvania is not a party to this agreement.

Multistate Reciprocity Agreement

The Multistate Reciprocity Agreement (MRA) was begun in 1948. Under this agreement, registration revenues are collected by the base state, and privileges for interstate travel are granted by other states which belong to the agreement. The base state is defined as the state where the vehicle "is most frequently dispatched, garaged, serviced, maintenanced, operated, or otherwise controlled." If the bases are in more than one state, the MRA allows registrations to be distributed among the base states in accord with mileage accrued.

The MRA is subscribed to by Alabama, Florida, Georgia, Indiana, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, New Jersey, North Carolina, North Dakota, South Carolina, Tennessee, Virginia, and West Virginia, and applies to any bilateral state-by-state reciprocity agreement not superseded by the IRP. (IRP mem-

bers from among the MRA members include the states of Alabama, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, North Dakota, Tennessee, and Virginia). Pennsylvania is not a party to this agreement.

The basic reason why many states chose not to participate in MRA was that those states had small base vehicle populations relative to the miles traveled by motor carriers and therefore believed that they would not receive sufficient fees as the base state to make up for the use of their highways by out-of-state trucks.

Fuel Taxes and Carrier Fuel Use Taxes

All states have some form of tax on diesel fuel and gasoline or a substitute fee or usage type of tax which replaces the revenues that the diesel fuel or gasoline tax would otherwise generate.

Because large trucks have the capability of traveling for a substantial range without refueling, it is easily possible for truck operators to traverse a state without buying fuel within that state and thereby pay fuel taxes at the pump. Forty states, including Pennsylvania, have therefore instituted motor carrier fuel use taxes under which the truck operator is responsible for reporting on the mileage traveled, calculating the fuel consumed within the state, and paying the taxes calculated as due on fuel consumed even though a different amount of fuel than consumed may have been purchased in the state. The fuel use taxes due are calculated based on each carrier's fleet miles of travel and fleet average fuel consumption, rather than for individual vehicles.

Ten states and the District of Columbia do not have motor carrier fuel use tax laws which require the carrier to report mileage and fuel consumed within their states. These include Alaska and Hawaii, for which the issue is moot due to their geographic separation from the other states, and Rhode Island and the District of Columbia,

whose size is so small that insignificant levels of revenue could be expected from attempting to collect a tax on fuel consumed. Florida also has no mechanism for reporting on mileage for fuel use tax purposes. All fuel sold in these jurisdictions is subject to a purchase tax.

Motor carriers operating in Oregon, Idaho, and Wyoming pay a tax based on weight and mileage instead of a fuel tax. Ohio substitutes an axle-mile tax for the fuel tax for carriers with over three axles. Wisconsin requires sufficient purchases within the State to cover the operator's use of fuel in Wisconsin.

The forty states which tax motor carriers' use of fuel follow a multitude of administrative procedures, and the state laws differ in terms of which fuels and vehicles are subject to the tax, what scope of operation is covered, filing periods and due dates for reporting, and policies towards crediting and refunding overpayments.

For fuel use tax purposes, carriers operating vehicles of over 17,000 lbs. gross registered weight report to Pennsylvania their mileage traveled in Pennsylvania and their total mileage.[1] Exhibit R-1 gives a breakdown of miles traveled by carriers in Pennsylvania and total mileage traveled, for each state in which carriers are located. As can be seen, substantial amounts of travel occur on Pennsylvania highways by carriers located out-of-state.

Usage Taxes

Usage taxes are those related to weight or axles and distance, and include a weight-distance tax (registered weight times miles traveled) a ton-mile tax (loaded weight times miles traveled for each trip) and an axle-mile tax (axles times miles traveled). One state (Kentucky) has a flat mileage tax which applies to vehicles over 59,999 pounds gross registered weight.

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[1] This reporting requirement is waived for all Pennsylvania-registered vehicles which travel 90 percent or more of their mileage in the Commonwealth (see Sload Affidavit, paragraph 6).

EXHIBIT R-1

MILES OF TRAVEL IN PENNSYLVANIA AND ALL MILES OF TRAVEL BY CARRIERS LOCATED IN THE VARIOUS STATES

Account State	PA Miles	All Miles	% PA Miles of All Miles
Alabama	17,728,029	472,819,172	3.75
Arizona	1,856,670	66,629,550	2.79
Arkansas	25,459,215	604,314,885	4.21
California	17,663,972	335,007,712	5.27
Colorado	7,563,538	182,715,471	4.14
Connecticut	11,352,248	131,817,223	8.61
Delaware	34,112,419	252,513,947	13.51
Washington, D.C.	88,673	4,008,054	2.21
Florida	114,370,666	1,410,240,605	8.11
Georgia	19,461,744	708,239,439	2.75
Idaho	1,740,179	41,322,892	4.21
Illinois	53,777,556	845,249,824	6.36
Indiana	84,175,354	1,154,859,591	7.29
Iowa	29,011,391	612,966,976	4.73
Kansas	49,336,184	739,935,326	6.67
Kentucky	11,151,078	212,729,906	5.24
Louisiana	613,022	64,159,836	0.96
Maine	4,709,593	100,687,391	4.68
Maryland	82,501,062	479,167,650	17.22
Massachusetts	20,992,296	221,016,952	9.50
Michigan	80,120,902	904,022,803	8.86
Minnesota	37,908,410	693,954,375	5.46
Mississippi	3,307,325	207,253,328	1.60
Missouri	46,839,889	882,884,447	5.31
Montana	1,013,458	50,960,429	1.99
Nebraska	20,078,908	388,760,104	5.16
Nevada	26,200	3,897,091	0.67
New Hampshire	2,018,346	38,687,370	5.22
New Jersey	149,413,069	967,427,918	15.44
New Mexico	243,754	5,084,438	4.79
New York	133,697,269	796,744,079	16.78
North Carolina	83,131,764	1,369,758,894	6.07
North Dakota	435,744	20,953,897	2.08
Ohio	179,081,177	1,517,165,291	11.80
Oklahoma	12,773,133	301,994,718	4.23
Oregon	18,576,060	268,275,751	6.92
Pennsylvania	651,956,107	1,661,153,639	39.25
Rhode Island	2,320,681	29,120,248	7.97

Account State	PA Miles	All Miles	% PA Miles of All Miles
South Carolina	9,148,219	255,582,238	3.58
South Dakota	4,264,744	126,737,247	3.37
Tennessee	32,769,461	652,402,943	5.02
Texas	26,008,932	631,769,969	4.12
Utah	8,767,231	180,954,673	4.84
Vermont	1,327,237	26,717,914	4.97
Virginia	55,233,684	828,304,805	6.67
Washington	1,519,774	32,970,927	4.61
West Virginia	17,612,239	115,388,226	15.26
Wisconsin	45,594,209	651,300,711	7.00
Wyoming	36,676	936,826	3.91
Pennsylvania Dealers	29,874	50,440	59.23
Total:	2,212,919,365	22,251,618,141	9.94 Avg.

Source: Department of Revenue. (See Gross Affidavit, para. 6.)

Exhibit R-2 summarizes the usage or weight-distance taxes which are now collected in ten states. The exhibit was prepared by the ATA, which calls these type of taxes "third structure" or "weight-distance" taxes.[1] ATA classifies these taxes as to their weight basis (either registered gross weight, unladen or empty weight, or vehicle type and number of axles). The ATA has also calculated the tax due during 1983 in cents per mile for a 78,000 pound diesel-powered tractor-semitrailer. There are a wide variety of usage fees which particular states have implemented. These types of fees apply to all heavy trucks traveling within these states, no matter where those trucks are registered. The 1983 tax rates ranged from 2.0 cents per mile to 8.3 cents per mile.

The Association of American Railroads has made similar calculations for an 80,000 pound tractor-semitrailer, and shows the rates for such a vehicle to be slightly

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[1] American Trucking Associations, Inc., *A Primer on State Highway User Taxes*, February 1984, p. 17.

higher (as expected) than for the 78,000 pound tractor-semitrailer.

Pennsylvania's axle tax is prorated by mileage (up to 2,000 miles) like weight-distance taxes, but the Pennsylvania axle tax does not increase for mileage beyond 2,000 miles. The maximum rate of Pennsylvania's axle tax on a per mile basis is 9 cents per mile for a five axle tractor-semitrailer traveling 2,000 miles or less. The average rate paid by all trucks for the Pennsylvania axle tax is much lower. The average for 1983 is estimated to be 3.1 cents per mile for Delaware carriers, 2.1 for Maryland, 3.0 for New Jersey, 2.1 for New York, 2.6 for Ohio, 2.7 for West Virginia, and 2.5 for all carriers from all states.[2] These rates place Pennsylvania's axle tax at the low end of the range of state usage tax rates per mile as shown in Exhibit R-2.

Retaliatory Taxes

Retaliatory taxes are special fees levied by a particular state upon motor carriers from specific other states—usually those which levy usage taxes. The number of states levying retaliatory taxes is constantly changing as states initiate new sources of revenue. According to the American Trucking Associations (ATA), about 22 states have the legal authority to levy retaliatory taxes,[1] but many of them do not exercise these provisions. In most instances, the retaliatory taxes yield little revenue even when they are enforced. However, a retaliatory tax can have significant adverse effects on carriers registered in a state which is being retaliated against.

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[2] These estimates are based on mileage reported by state for carrier fuel use tax purposes and axle tax payments by state for 1983. (See Gross Affidavit, paragraphs 6, 7). The estimates ignore rebates of the axle tax, which are expected to reduce the amounts paid by approximately ten percent. (See Affidavit of Revenue Secretary James Scheiner, paragraph 16.)

[1] American Trucking Associations, Inc. "The Case Against Weight-Distance (Ton-Mile) Truck Taxes," January 1983.

EXHIBIT R-2

AMERICAN TRUCKING ASSOCIATIONS ESTIMATES OF USAGE (WEIGHT-DISTANCE) TAX RATES FOR 78,000 POUND TRACTOR-SEMITRAILER

	Weight Basis for Tax			
	Registered Gross Weight of Combination	Unladen or Empty Weight of Combination [a]	Vehicle Type and Number of Axles	Rate in Cents per Mile
Arizona	x			8.0 [c]
Colorado		x		6.18 [b]
Idaho	x			4.275
Kentucky	x			2.85
Nevada		x		2.25 [c]
New Mexico	x			3.055
New York	x			3.7 [d]
Ohio			x	2.0
Oregon	x			8.3 [e]
Wyoming		x		4.056 [f]

Sources: 1. American Trucking Associations. *Bulletin Advisory Service.* Washington, DC: ATA, 1983.

2. Federal Highway Administration. *Road User and Property Taxes on Selected Motor Vehicles 1982.* Washington, DC: FHWA, U.S. Department of Transportation, 1983.

[a] Unladen or empty weight for this particular combination would be 27,062 pounds (78,000 pounds minus total load weight of 50,938), except in Wyoming. See data for Vehicle Type 11, Source No. 2, Table 1, p. 13.

[b] Weight basis for rate listed is empty weight plus cargo weight. If carriers document a negotiated weight factor for all vehicles in a fleet, the resulting rate per mile may be lower than that given above. Colorado is the only state using negotiated average operating weight rather than registered weight as a basis.

[c] Plus a flat fee of $8.00 per power unit. This alternative mileage fee is usually chosen by carriers in lieu of the unladen weight fees

As a result of the imposition of Pennsylvania's axle tax, eight states now levy or have stated an intention to levy retaliatory taxes on trucks registered in Pennsylvania. These retaliatory taxes would mirror Pennsylvania's axle tax by imposing a similar fee, but only on trucks registered in Pennsylvania. Trucks registered in states other than Pennsylvania are not subject to this retaliatory tax. The eight states are Oklahoma, Nebraska, Florida, Georgia, New Jersey, Vermont, New Hampshire, and Maine.

Other Taxes

Other taxes such as gross receipts taxes on for-hire carriers are levied in sixteen states, including Pennsylvania. Property taxes are assessed on vehicles in twenty-seven states, although not in Pennsylvania.

(from $59 to $595) because those fees may not be prorated. An additional $3.00 Public Service Commission fee is collected by the same agency.

[d] Rate listed is for a fully or partially loaded truck under New York's first compliance option.

[e] Rate per mile given above is for all vehicles using fuels other than gasoline or purchasing gasoline outside Oregon for use in Oregon.

[f] Wyoming law provides that the unladen weight (now tax weight) for a vehicle combination is 40% of the declared maximum gross weight; the unladen weight for the combination used here would therefore be 31,200 pounds.

APPENDIX R-3

COMPARISON OF FEES FOR PENNSYLVANIA TRUCKS COMPARED TO FEES FOR TRUCKS REGISTERED IN OTHER STATES

Comparison with Bordering States

The attached Exhibits R-3 and R-4 show Pennsylvania's current registration fees in comparison to those of its bordering states, for a five axle tractor-semitrailer combination registered at the maximum legal weight of 80,000 pounds for a tractor-semitrailer combination. Most of the mileage of trucks engaged in interstate commerce are traveled by tractor-semitrailer combinations with either five or four total axles.

Pennsylvania's fees are higher than those of any bordering state. Pennsylvania's registration fee is even higher than the sum of the bordering state's registration fee *plus* the Pennsylvania axle tax for each of these

EXHIBIT R-3

FEE FOR REGISTERING A TRACTOR-SEMITRAILER WITH 80,000 POUNDS GROSS COMBINATION WEIGHT

	Tractor	Semitrailer	Total
Pennsylvania	$945	$27	$972
New Jersey	840	20.50	710.50
New York	840	20	860
Ohio [1]	657.50	16	673.50
West Virginia	718.50	(included)	718.50
Maryland	640	15	655
Delaware [2]	384	20	404

Source: Computed from *ATA Bulletin Advisory Service*, June 1984. Fees included registration, vehicle inspection fees, and handling fees.

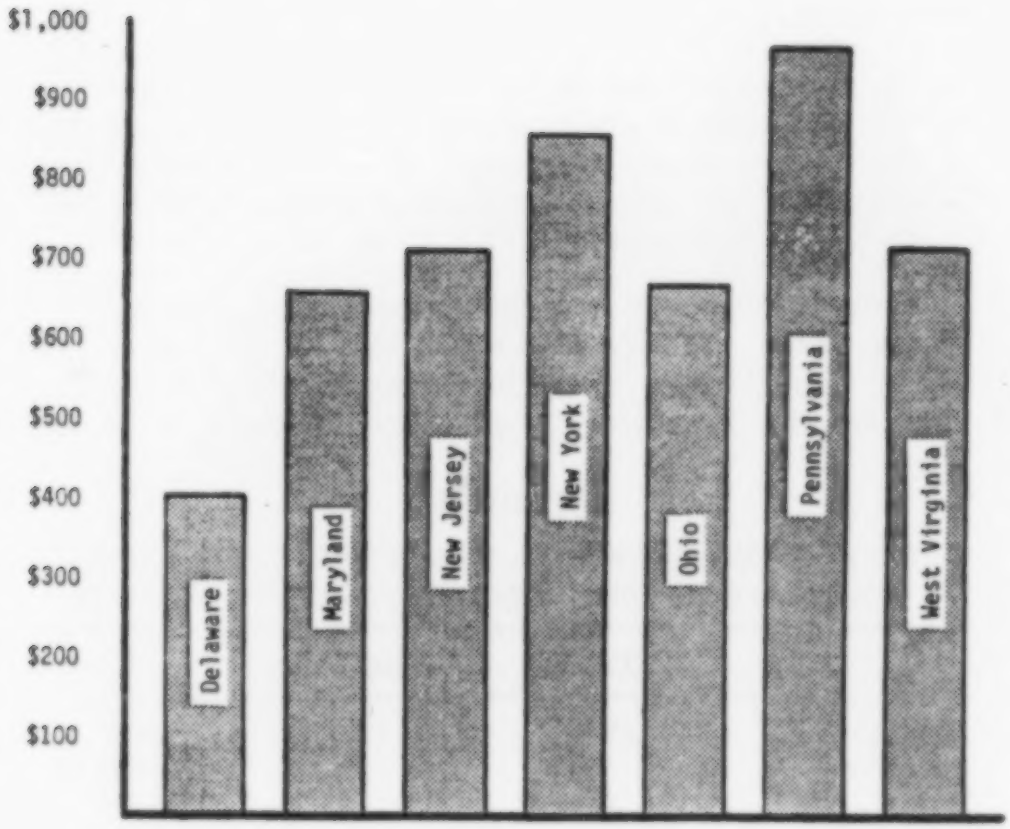
[1] Based on calculations by ATA for unladen weight of tractor, which is the basis for registration fees in Ohio.

[2] Based on using the most advantageous of options for registering both a tractor and a semitrailer.

EXHIBIT R-4

COMPARISON OF REGISTRATION FEES FOR PENNSYLVANIA

AND SURROUNDING STATES FOR AN 80,000 POUND TRACTOR-SEMITRAILER



Source: Computed from ATA Bulletin Advisory Service; American Trucking Associations, Inc.; June 1984. Fees include registration, vehicle inspection fees, and handling fees.

states except New York. Pennsylvania's axle tax is, of course, also collected from carriers registered in Pennsylvania.

Therefore, heavy trucks engaged in interstate commerce which are registered in bordering states pay lower total fees (registration plus Pennsylvania axle tax) to operate in Pennsylvania than do Pennsylvania registered trucks. This is because Pennsylvania grants full reciprocity on registration fees to carriers from the bordering states, even though the other states' registration fees are lower than Pennsylvania's (as much as $568 lower in the case of Delaware).

Comparative Registration Fees in Reciprocity States

Exhibit R-5 shows the registration fees for tractor-semitrailers at 78,000 pounds gross combination weight in all the states to which Pennsylvania grants reciprocity. This information was prepared by the American Trucking Associations as of February 1984. As can be seen, the average registration fee for these states was $688.60, which was $267.40 lower than the fee for a similar combination to be registered in Pennsylvania.

In order to operate in Pennsylvania, both Pennsylvania-registered trucks and out-of-state registered trucks of this combination weight would pay an axle tax of $180, based on five total axles for the tractor and semitrailer. Thus, on average, vehicles registered in these other states and traveling in Pennsylvania would pay less combined registration fees and axle tax than would a Pennsylvania registered vehicle.

Comparative Registration Fees in Member States of the International Registration Plan (IRP)

Member states of the IRP prorate the registration fees due each state on the basis of the proportion of each carrier's total miles of travel which occur in each member

state. Mileage which occurs in non-member states is credited in most IRP states, including Pennsylvania, to the state in which the vehicles are registered.

If a carrier registered in another IRP member state travels 25 percent of its total mileage in Pennsylvania,

EXHIBIT R-5

REGISTRATION FEES FOR 78,000 POUND TRACTOR-SEMITRAILER IN STATES WITH WHICH PENNSYLVANIA HAS RECIPROCITY AGREEMENTS

State	Registration Fee
California	$1,081.00
Connecticut	878.00
Delaware	404.00
Florida	979.50
Georgia	708.00
Indiana	730.25
Maine	795.00
Maryland	639.00
Massachusetts	576.00
Nevada	166.00
New Hampshire	606.52
New Jersey	688.50
New Mexico	75.00
New York	839.00
Ohio	673.50
Rhode Island	430.00
South Carolina	673.00
Vermont	1,175.90
Washington	955.35
West Virginia	698.50
Average	$688.60
Median	$693.50
Pennsylvania	$936.00

Source: American Trucking Associations, Inc., *A Primer on State Highway User Taxes*, February 1984; data as of February 1984.

the Commonwealth of Pennsylvania will receive 25 percent of the registration fee which it would receive if the carrier registered in Pennsylvania and did all its travel within Pennsylvania. Likewise, the carrier would pay its proportional registration fees to other IRP member states on the basis of the proportion of mileage traveled in each IRP state and on the basis of each IRP states' registration fee. The IRP system thus provides for payment of registration fees to all the states travelled in while allowing each to set its own fee structure.

All carriers with trucks registered in IRP member states and which travel in Pennsylvania pay the same Pennsylvania axle tax as do carriers with identical trucks registered in Pennsylvania. Thus, all carriers from IRP member states are treated the same in terms of both registration fees and the Pennsylvania axle tax.

Data from the American Trucking Associations (ATA) and from the Association of American Railroads (AAR) indicate that heavy trucks in Pennsylvania pay registration fees which are higher than the national average. The ATA estimated the average state-registration fee as $863.78 in February 1984 for a five axle diesel-powered tractor-semitrailer of 78,000 lbs (2,000 lbs. less than the maximum weight of 80,000 pounds). ATA calculated the Pennsylvania registration fee for the 78,000 pound combination to be $936. The AAR estimated the average state registration fee as $881 for a five axle tractor-semitrailer of 80,000 pounds in July 1984, and estimated Pennsylvania's registration to be $972.

The average national state registration fees estimated by ATA and AAR differ not only because of the weight differential and the different months, but also due to some differences in assumptions about the fees for those states that do not register on the basis of gross weight or that do not assign the fees to highway uses. Because an average unladen weight for a tractor-semitrailer which can

carry 80,000 pounds must be assumed in many states, the calculation of an average registration fee for all states is quite complicated and can differ based upon the assumptions made by the analyst.

Virtually the same relationships will occur for two axle tractors pulling two axle semitrailers, except their registration fees and Pennsylvania axle tax will be lower than for tractor-semitrailers with a total of five axles. Single unit trucks, most of which have two or three axles, are primarily engaged in local travel within their base state of operation. Data from the United States Census Bureau's Truck Inventory and Use Survey indicate that, on average, only one percent of single unit trucks are used primarily in long range operations.[1]

For those single unit trucks which do operate both within Pennsylvania and its bordering states, Pennsylvania's registration fees are slightly higher for most weight classes than the registration fees of the bordering states. There are some slight exceptions for a few particular weight classes. Both the single unit trucks registered in Pennsylvania and the single unit trucks registered in the bordering states will pay the same Pennsylvania axle tax if they operate in Pennsylvania. Therefore, the situation for single unit trucks is the same as for tractor-semitrailer trucks. A vehicle registered in Pennsylvania will generally pay higher total fees (registration plus axle tax) to operate in Pennsylvania than will a similar vehicle from a bordering state.

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[1] U.S. Department of Commerce, Bureau of the Census, *1977 Census of Transportation: Truck Inventory and Use Survey*, Report No. TC77-T-52, May 1980.

APPENDIX R-4

IMPACT OF REGISTRATION FEE INCREASES ON PENNSYLVANIA'S REGISTRATIONS OF TRUCKS

Many carriers can choose the base state of registration for their trucks from among many states, since they travel extensively in many states and may even have facilities or terminals in many states. Thus, if one state raises its registration fees, and other states do not, it may be to the carrier's advantage to shift some or all of its registrations out of the state which raised registration fees.

The impact of increased registration fees on Pennsylvania truck-tractor registrations is shown in Exhibit R-6. The exhibit shows truck-tractor registrations by year for Pennsylvania and for the six surrounding states. The percentage of truck-tractors in the seven states which were registered in Pennsylvania in each year is

EXHIBIT R-6

PERCENTAGE OF TRUCK-TRACTORS REGISTERED IN PENNSYLVANIA AND THE SIX SURROUNDING STATES: 1978-1982

	1978	1979	1980	1981	1982
Pennsylvania	75,540	76,428	78,677	45,182	45,853
Delaware	8,156	8,512	9,051	5,886	6,113
New York	43,148	45,591	45,039	29,864	30,263
Maryland	17,708	18,103	16,547	15,779	20,979
Ohio	113,491	86,195	95,055	73,343	67,679
West Virginia	8,600	9,374	9,796	8,319	7,187
New Jersey	35,927	24,413	25,340	30,022	30,957
Totals	302,570	268,616	279,505	208,395	209,031
Percent Pa.	24.97%	28.45%	28.15%	21.68%	21.94%

Source: Federal Highway Administration, *Highway Statistics*, annual publication for years shown.

shown on the bottom line. The data show that when Pennsylvania raised registration fees in 1980, the proportion of truck-tractors registered in Pennsylvania declined substantially in comparison to the surrounding states.

Pennsylvania increased its registration fees on August 17, 1980. From 1980 to 1981, registrations of truck-tractors dropped 43 percent in Pennsylvania, dropped 23 percent in Ohio, dropped 15 percent in West Virginia, increased 18 percent in New Jersey, dropped 5 percent in Maryland, dropped 34 percent in New York, dropped 35 percent in Delaware, and dropped 12 percent in the nation as a whole. (This was a period of recession which had substantial negative economic impacts on the trucking industry.)

It is also interesting to note that between 1978 and 1980, when registration fees were stable, Pennsylvania registrations of truck-tractors gained 4 percent, as did Pennsylvania registrations of semitrailers. During the same period, tractors and semitrailers in New York each gained 4 percent.

In summary, Pennsylvania registrations of tractor trucks dropped relative to those of surrounding states when an increase in registration fees occurred. However, when registration fees in Pennsylvaia remained stable, Pennsylvania's registrations grew at the same rate or better than that for surrounding states.

Impact of Retaliatory Taxes

Eight states now retaliate, or have stated an intent to retaliate against Pennsylvaia-based trucks by assessing an axle tax against Pennsylvaia trucks which operate in their states. The eight states are Oklahoma, Nebraska, Florida, Georgia, New Jersey, Vermont, New Hampshire, and Maine. As a result of retaliation by these states, Pennsylvania's registrations of heavy trucks may not be as high as they would be if retaliation did not occur.

Exhibit R-7 shows available data through 1984 on Pennsylvania registrations for the largest trucks. After

EXHIBIT R-7

TRUCK REGISTRATIONS AT 73,280 POUNDS OR OVER IN PENNSYLVANIA 1978-1984

Year	Number of Registrations	Percent Change (Year)
1978	42,409	NA
1979	44,606	+5.2%
1980	48,419	+8.6%
1981	40,413	−16.5%
1982	37,405	−7.4%
1983	39,512	+5.6%
1984 (to July)	35,766	−9.5%

Source: Tabulation provided by Linley Oberman, Pennsylvania Department of Transportation, Bureau of Motor Vehicles. (See Oberman Affidavit, paragraph 4.)

the 1980 tax increase, registrations dropped by 16.5 percent in 1981 and a further 7.4 percent in 1982. This is consistent with the trends shown in the FHWA data (Exhibit R-6). Approximately 11,000 trucks in the heaviest weight classes did not have Pennsylvania registrations in 1982 when compared to 1980.

The 1984 figures are preliminary. However, if registrations do decrease in 1984 compared to 1983, it may be partially due to the retaliatory taxes. For example, a carrier registering in Pennsylvania and operating in Pennsylvania and New Jersey would pay both the Pennsylvania axle tax and the retaliatory New Jersey tax. However, a carrier registered in New Jersey and operating in both states would pay only the Pennsylvania axle tax. Thus, retaliatory taxes may provide a disincentive to register in Pennsylvania.

APPENDIX R-5

USE OF AND NECESSITY FOR USE OF PRIMARY, SECONDARY, AND LOCAL ROADS BY TRUCKS ENGAGED IN INTERSTATE COMMERCE

Within the overall trucking industry, some types of trucking activity take place locally and some are mostly interstate. Single unit trucks, which usually have either two or three axles, provide primarily local services, and travel an average of 10,000 to 20,000 miles per year. Combination trucks (e.g., a tractor linked to a semi-trailer) typicaliy have five axles, but sometimes have four axles or more than five axles. They provide primarily long distance and interstate services and travel an average of 40,000 to 60,000 miles per year. While a large majority of single unit trucks do all or most of their travel within their base state of operation, large combination trucks do most of their travel outside their base states.

Vehicles traveling in interstate commerce, like all other vehicles, have an origin and a destination on roads which do not have full access control. The origin or destination of interstate truck travel may be on a primary, secondary, or local road in either a rural area or an urban area. Thus, trucks engaged in interstate commerce use and benefit from improvements to primary, secondary, and local roads. Because they can not access their origins or destinations without primary, secondary, and local roads, the relative benefits to interstate trucking of these roads is much greater in magnitude than their relative mileage on such roads.

The estimated 1977 miles of travel in Pennsylvania by combination trucks of over 40,000 lbs. is shown in Exhibit R-8. These estimates were prepared by Sydec in conjunction with the Truck Size and Weight Study submitted by the U.S. Department of Transportation to the U.S. Congress. As can be seen, such combination trucks,

EXHIBIT R-8

ESTIMATED 1977 TRAVEL BY ROAD TYPE FOR COMBINATION TRACTOR-SEMITRAILERS OF OVER 40,000 POUNDS REGISTERED WEIGHT

Type of Area	Vehicle Miles of Travel (millions)				
	Interstate	Arterial	Collector	Local	Totals
Urban	159	237	48	61	505
Rural	439	385	189	141	1,154
Total	598	622	237	202	1,659

Source: Derived by Sydec from the sample survey conducted by the U.S. Bureau of the Census as part of the Truck Inventory and Use Survey (1977), and from classification counts for types of vehicles using each type of road in Pennsylvania. (See Affidavit of George Wass, paragraph 5.)

the majority of whose mileage is devoted to interstate travel, travel hundreds of millions of miles on all the road systems of Pennsylvania. Their total mileage on Interstates, arterials, collectors, and local routes was over 1.6 billion vehicle miles of travel in 1977. About 64 percent of the travel by these trucks was on the arterial, collector, and local roads, while 36 percent was on the Interstate highway system. Thus, these vehicles use all the road systems in the State of Pennsylvania. The fact that they may be engaged in interstate commerce doesn't mean that their travel is solely, or even mostly on Interstate highways.

Exhibit R-9 shows the estimated percentage of travel in-state and out-of-state by five axle combination trucks based in Pennsylvania and its six surrounding states. These estimates were derived from the U.S. Bureau of the Census Truck Inventory and Use Survey, which is conducted every five years. The Census asks truck owners (among other questions) what percentage of miles

EXHIBIT R-9

ESTIMATED PROPORTION OF MILEAGE IN BASE STATE AND OUT-OF STATE FOR FIVE AXLE COMBINATION TRUCKS

Base State of Registration	Percentage of Miles	
	In-State	Out-of-State
Pennsylvania	46%	54%
Delaware	20%	80%
Maryland	41%	59%
New Jersey	43%	57%
New York	51%	49%
Ohio	47%	53%
West Virginia	43%	57%

Source: Estimated by Sydec from the sample survey data collected by the Bureau of the Census as part of the Truck Inventory and Use Survey, 1977.

of travel by their truck occurs in the base state of operation.

As can be seen, in Pennsylvania and most surrounding states, a majority of miles of travel by five axle combinations occurs outside the base state of operation. The maximum percentage of out-of-state travel by state is 80 percent for combinations based in Delaware, and the smallest is 49 percent for combinations based in New York.

The Affidavit of Harry S. Cohen contains an estimation of the miles of travel in Pennsylvania by trucks subject to the axle tax, broken down by Pennsylvania-based trucks, trucks from other IRP states, and trucks from non-IRP states.

The needs of large combination trucks to access terminals and destinations is recognized by specific federal laws and regulations. The Federal Highway Administra-

tion has designated a network of highways on which commercial vehicles with the dimensions authorized by the Surface Transportation Assistance Act of 1982 (STAA) may operate. The STAA authorized the maximum length, width, and weight limits for large trucks and made those limits consistent throughout the country[1] Forty-four major routes within Pennsylvania are part of the national network. Pennsylvania has also designated a substantial number of access routes to allow large commercial trucks to get to and from origins and destinations which are off those routes.

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[1] The designated network is codified in 23 CFR Part 638, contained in Federal Register Volume 49, Number 109, Tuesday, June 5, 1984.

AFFIDAVIT

[In Support of Respondents' Motion for Summary Judgment]

I, JOSEPH R. STOWERS, state that the following facts are true and correct to my personal knowledge.

1. I am employed by System Design Concepts, Inc. (Sydec), a leading expert consulting firm in the area of highway taxation and finance. I hold the position of President. I have held this position since 1981 and have been employed by System Design Concepts, Inc., since March 1970.

2. During the last fourteen years I have conducted numerous studies and analyses of highway system characteristics and use by various classes of vehicles. I have conducted detailed analyses of such topics for agencies such as the National Academy of Sciences, the Federal Highway Administration, and the American Association of State Highway Officials. A resume of my experience is attached as Exhibit S-1.[1]

3. An interstate carrier desiring to operate vehicles in Pennsylvania has three basic options for registration:

   a. The carrier may register any vehicle, or fleet of vehicles, under the International Registration Plan (IRP) in any of the 27 states (or in Alberta, Canada) which are members of the IRP (including Pennsylvania), with certain conditions and exceptions, as defined in Appendix S-1.

   b. The carrier may register any vehicle in another state (or province of Canada) which

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[1] All Appendices referred to in, and attached to, this Affidavit are incorporated in the Affidavit as if fully set forth. This includes all exhibits within those appendices. Unless otherwise stated, the facts set forth in those appendices are known to me personally.

has a reciprocity agreement with Pennsylvania, as explained in Mr. Reno's Affidavit, Appendix R-2, "Types of Highway User Fees."

c. The carrier may register any vehicle in Pennsylvania on a non-IRP basis—i.e., conventional registration, often referred to as non-apportioned registration to contrast it with the process of apportioning registration fees among states under the IRP.

4. If a carrier chooses to register vehicles under the IRP, he may do so in any state which qualifies as a "base jurisdiction"—i.e., any member state or province where the carrier "has an established place of business, where mileage is accrued by the fleet and where operational records of such fleet are maintained or can be made available . . ." Thus, a carrier might be able to register in any of several states where an office might be located.

5. In general, carriers are quite free to choose the state of registration if they register vehicles on a non-apportioned basis. Most states do not impose strict requirements on a carrier in order to register because the states collect fees that would not otherwise be collected if the carrier registered elsewhere.

6. Pennsylvania's law requires carriers which have their principal place of business in the Commonwealth to register their locally-based fleet in Pennsylvania (see Affidavit of Linley Oberman, paragraph 6). However, this is difficult to enforce for vehicles which travel a high proportion of their mileage in one or more other states because of the difficulty of distinguishing which state is the base of operation of each such vehicle.

7. Thus, under any of the three basic options, a carrier is quite free to change the jurisdiction of registration to suit his convenience or to reduce his total tax payments. In most states, it is not even necessary to have an actual office—the use of an agent will suffice. If records must be made available for auditing they can either be brought to the state or the auditors can be required to travel out-of-state to the actual base of operation (although the carrier is required to pay such travel expenses under the IRP agreement).

8. Carriers have been increasingly able to take advantage of the freedom of movement among the states for registration purposes in recent years because of changes that have been taking place in the industry. Many years ago, the industry was characterized by many small carriers operating within one state or one small region. The steady, long-term trend has been toward larger national carriers which operate in many states. Even the smaller carriers tend to operate over a much larger geographic area, so that a very high proportion of interstate carriers now have the flexibility to change their state of registration.

9. Evidence exists to demonstrate that carriers have taken advantage of this freedom of movement for registration purposes to reduce their overall tax payments. Increases in Pennsylvania registration fees have been followed by shifts in registration to surrounding states (see Reno's affidavit). Exhibit S-1 shows that truck-tractor registrations are particularly high in Delaware, which is the state with the lowest heavy truck registration fees of all non-IRP states in the eastern half of the country. (Only New Mexico

and Nevada have lower rates, but they are both states which have usage taxes, as described in Mr. Reno's affidavit, possibly tending to discourage registrations in those states.) The exhibit also shows that states with the highest heavy vehicle registration fees tend to have lower concentrations of truck-tractors. California and Vermont have the highest fees and are two of the four lowest in concentration of registrations.

10. Carriers have an incentive to register vehicles under the IRP if they regularly operate vehicles in several jurisdictions which are members of IRP. Administrative costs can be significantly reduced because of the ease of registering vehicles in several states and because of the standardization of reporting and payment of fees. As a result, the number of vehicles registered under IRP has grown steadily over the decade since it was created, and the number of member jurisdictions has grown from four in 1973 to 28 today. Membership is expected to increase to 34 as a result of decisions expected this year, and several other states are in various phases of considering membership. Moreover, the National Governors' Association has recently adopted a program to promote additional membership in IRP and take other actions that will increase uniformity among the states to reduce administrative burdens on the motor carrier industry.

11. Under the IRP registration proration plan, each carrier pays fees to each jurisdiction based on the proportion of miles traveled in the jurisdiction and the registration fee of the jurisdiction. Thus, for example, when Pennsylvania increased its registration fees in 1976 and 1980 and decreased them in 1982, these fee changes were

distributed to all in-state and out-of-state IRP carriers on an equal basis in proportion to the relative shares of their mileage in Pennsylvania. Because the IRP system is becoming increasingly popular, it will be applicable to an increasing proportion of all interstate carriers in the future.

12. Pennsylvania has been the only state in the Northeast to join the IRP system to date. This has left the Commonwealth surrounded by six non-IRP states. Interstate carriers can operate between all of these states and Pennsylvania under a set of bilateral reciprocity agreements (see Mr. Reno's affidavit). Because these states have no proration agreements with the Commonwealth, changes in registration fees in any of these states are not apportioned and they result in incentives for migration of vehicles among these states. The general trend has been for these non-IRP states to have lower registration fees than Pennsylvania and other IRP states, and to attract increased registrations as a result (see Mr. Reno's affidavit). The overall long-term trend of this pattern, therefore, has been to favor carriers which locate in low fee non-IRP jurisdictions and operate in other nearby states (such as Pennsylvania) under reciprocity agreements. Carriers which have left Pennsylvania and migrated to adjoining states have benefited from this trend, while Pennsylvania highway user taxpayers, including carriers remaining in the Commonwealth, have not.

13. The vast majority of heavy vehicles registered in Pennsylvania travel a substantial portion of their mileage outside of Pennsylvania and are owned by firms engaged in business outside, as well as in the Commonwealth.

The carriers which travel the highest proportion of their mileage out-of-state are those that have IRP registrations. Exhibit S-3 shows that only 44.7 percent of all mileage traveled by Pennsylvania-based IRP carriers is in-state. The majority of their mileage (55.3 percent) is outside of the state, largely in the surrounding states but also widely scattered throughout the East and Middle Atlantic states.

Exhibit S-4 presents another related set of estimates of in-state vs. out-of-state mileage for a much larger group of vehicles—all vehicles of 17,000 pounds or more registered weight which travel some or all of their mileage in Pennsylvania. The first row of this exhibit shows that about 60 percent of the mileage of those carriers located in Pennsylvania is in-state, or alternatively, that about 40 percent of their mileage is out-of-state. This estimate (40%), however, is probably an underestimate of the proportion of mileage which is out-of-state for all Pennsylvania-based vehicles which are subject to the axle tax.[1]

Exhibit S-5 presents a third tabulation showing estimates of the proportion of mileage which is out-of-state for each of several classes of trucks, broken down by configuration and number of

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[1] Three reasons exist for believing that it is an underestimate: (1) all vehicles over 17,000 pounds registered weight are included: vehicles of less than 26,000 pounds (the threshold for the axle tax) tend to travel fewer miles out-of-state; (2) the estimate of mileage by vehicles having 90 percent or more of their mileage in Pennsylvania (see source note in Exhibit S-4) is probably high because it is based on 1977 data and Pennsylvania registrations have decreased substantially since then; and (3) carriers have an incentive for stating that they have 90 percent or more of their mileage in Pennsylvania to avoid having to periodically report mileage, fuel tax paid, and other data.

axles. The proportion of mileage which is out-of-state is estimated to be about 36 percent for all trucks covered, but these include all trucks over 14,000 pounds. If the lightest class of trucks, two axle single units, is removed from the tabulation, this estimate increases to about 47 percent. This is a more realistic estimate of the proportion of mileage which is out-of-state for all Pennsylvania-based trucks subject to the axle tax because most of the two axle trucks are registered at below 26,000 pounds.[2]

14. Firms which operate trucks primarily intrastate are seldom in direct competition with interstate carriers. As Exhibit S-5 shows, the trucks which are primarily involved in intrastate operations are single unit trucks. The majority of the vehicle miles of all trucks which fall in the category of 0 to 25 percent of mileage out-of-state are two axle trucks. More careful analysis of these data would show that trucks operating primarily intrastate are using quite different equipment, carrying different commodities, and have basically different markets from interstate carriers.

15. A very high proportion of the damage to Pennsylvania highways and bridges is due to travel by out-of-state carriers because of the high proportion of the total truck vehicle-miles of travel (VMT) in Pennsylvania by out-of-state carriers, and because of the fact that out-of-state

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[2] The average registered weight for trucks in this sample (two axle Pennsylvania-based trucks of over 14,000 pounds registered weight) is 16,230 pounds. Moreover, the trucks in this class which travel more miles out-of-state tend to be ones which operate at higher weights, on the average.

carriers operate heavier equipment in Pennsylvania than Pennsylvania-based carriers, on the average.

Exhibit C-1 of Mr. Harry S. Cohen's affidavit shows that an estimated 34 percent of all truck traffic on Pennsylvania highways is non-IRP out-of-state carriers. That exhibit also shows that the majority (about 55 percent) of all truck traffic on Pennsylvania highways is out-of-state carriers.

Exhibit S-4 shows that substantial portions of mileage reported to Pennsylvania by carriers located in all surrounding states are in Pennsylvania—ranging from a high of 17.2 percent for Maryland to 13.5 percent for Delaware. Note that the states which are the source of the highest proportion of mileage in Pennsylvania are the non-IRP states surrounding Pennsylvania.

Exhibit S-6 presents a tabulation of out-of-state mileage percentages for all of the six (non-IRP) states bordering Pennsylvania, in the same format as presented for Pennsylvania-based trucks in Exhibit S-5. This exhibit shows percentages of out-of-state mileage for surrounding states very similar to Pennsylvania. The one notable difference is that a somewhat higher proportion of the mileage of five axle combinations (58 vs. 54 percent) is out-of-state, suggesting that surrounding states' heavier trucks may travel a higher proportion of their miles on Pennsylvania highways than the reverse.

16. Pennsylvania's axle tax is $36 per axle for all vehicles registered at over 26,000 pounds. Thus, vehicle owners pay the tax in direct proportion to the number of axles on their trucks, which is a reflection of the fact that highway costs in-

crease as the axle loads and gross weights of vehicles increase. Exhibit S-7 shows that vehicle weights in Pennsylvania do, in general, increase as the number of axles increases. For both loaded and empty single unit trucks, the average weight of 3 or more axle trucks was about twice the weight of 2 axle, 6 tire trucks in each of the three years for which data have been reported. Also for both loaded and empty tractor-semitrailer combinations, the average weight of vehicles went up without exception as the number of axles increased for each of the three years.[1]

/s/ Joseph R. Stowers
JOSEPH R. STOWERS

Sworn to and subscribed to me
this 17th day of August, 1984.

/s/ [Illegible]
NOTARY PUBLIC

My Commission expires,
9-30-84

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[1] The only exception to the general rule that weight goes up as axles increase is that loaded 4 axle combinations did not weigh more than single unit trucks with 3 or more axles (which are mostly 3 axle trucks) in 1978—they were almost the same average weight (40,400 vs. 40,600 pounds respectively). However, the lower portion of Exhibit S-7 shows that when the average of all vehicle weights are compared, taking into account the fact that single unit trucks are more often empty than tractor-semitrailer combinations, the average weights of 4 axle combinations was always substantially greater than the ave-age weights of single unit trucks of 3 or more axles.

APPENDIX S-1

CONDITIONS AND EXCEPTIONS FOR REGISTRATION OF VEHICLES UNDER THE INTERNATIONAL REGISTRATION PLAN

This appendix summarizes the conditions and exceptions for registering vehicles, or fleets of vehicles, under the IRP, based on the terms of the multi-state agreement of which Pennsylvania is a member.[1]

Types of vehicles which are excluded are recreational vehicles, vehicles displaying restricted plates, city pick up and delivery vehicles, buses used in transportation of chartered parties, and government-owned vehicles. Vehicles which are covered by the IRP program are vehicles used, or intended for use in two or more member jurisdictions and which are used for transportation of persons or goods. The system normally covers all such vehicles having a gross weight in excess of 26,000 pounds or units of truck combinations having gross weights in excess of 26,000 pounds. A truck-tractor having three or more axles also qualifies regardless of weight. In addition, registrants of the IRP have the option of including vehicles having gross weights of 26,000 pounds or less and two axle vehicles which meet the other criteria.

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[1] *International Registration Plan*, American Association of Motor Vehicle Administrators, revised as amended 3/1/84.

EXHIBIT S-2

COMPARISON OF HEAVY TRUCK REGISTRATION FEES AND
NUMBER OF TRUCK-TRACTOR REGISTRATIONS IN RELATION TO POPULATION
FOR ALL NON-IRP STATES

	Registration Fee for 78,000 Lbs.1/	Percent of U.S. Population, 1980 2/	Percent of 1980 Registrations	Ratio of Truck-Tractor Share to Population Share
California	$1,081	10.45	5.05	0.48
Connecticut	878	1.37	0.48	0.35
Delaware	404	0.26	0.65	2.50
Florida	979.50	4.30	4.62	1.07
Georgia	708	2.41	2.39	0.99
Indiana	730.25	2.42	3.27	1.35
Maine	795	0.50	0.50	1.00
Maryland	639	1.86	1.18	0.63
Massachusetts	576	2.53	1.95	0.77
Nevada	166	0.35	0.20	0.57
New Hampshire	606.52	0.41	0.35	0.85
New Jersey	688.50	3.25	1.81	0.57
New Mexico	75	0.58	0.54	0.93
New York	839	7.75	3.21	0.41
Ohio	673.50	4.77	6.78	1.42
Rhode Island	430	0.42	0.44	1.05
South Carolina	673	1.38	1.29	0.93
Vermont	1,175.00	0.23	0.09	0.40
Washington	955.35	1.82	2.68	1.47
West Virginia	698.00	0.86	0.70	0.81

1/American Trucking Associations, Inc., A Primer on State Highway User Taxes, February 1984, p. 4.

2/U.S. Bureau of the Census, 1980 Census of Population, U.S. Summary, April 1983.

3/Federal Highway Administration, Highway Statistics 1980.

EXHIBIT S-3

SUMMARY OF MILEAGE TRAVELED IN VARIOUS STATES
BY PENNSYLVANIA-BASED IRP VEHICLES

State	Annual Miles (thousands)	Percent
Pennsylvania	460,154	44.7
Ohio	90,181	8.8
New York	66,753	6.5
New Jersey	64,443	6.3
Virginia	50,299	4.9
Maryland	49,549	4.8
Indiana	24,937	2.4
West Virginia	17,902	1.7
North Carolina	17,815	1.7
Connecticut	17,518	1.7
Tennessee	14,333	1.4
Illinois	14,247	1.4
Massachusetts	10,901	1.1
Delaware	9,683	0.9
All others	121,191	11.8
Total	1,029,907	100.1

Source: Tabulation of reported annual mileage from 2,572 carriers registering vehicles in Pennsylvania under IRP, covering 16,174 power units of over 26,000 pounds registered weight. Prepared by Linley Oberman, Pennsylvania Department of Transportation. (See Oberman Affidavit, paragraph 5 .)

EXHIBIT S-4

SUMMARY OF ANNUAL MILEAGE IN PENNSYLVANIA AS A PERCENT OF ALL MILEAGE TRAVELED FOR ALL CARRIERS REPORTING MILEAGE TO PENNSYLVANIA

State Where Carrier Is Located	Annual Miles (millions) In Pennsylvania	ATI Miles	Percent in Pennsylvania
Pennsylvania	1,587	2,645	60.0
Maryland	82.5	479	17.2
New York	134	797	16.8
New Jersey	149	967	15.4
West Virginia	17.6	115	15.3
Delaware	34.1	253	13.5
Ohio	179	1,517	11.8
Massachusetts	21.0	221	9.5
Michigan	80.1	904	8.9
Connecticut	11.4	132	8.6
Florida	114	1,410	8.1
Rhode Island	2.32	29.1	8.0
Indiana	84.2	1,155	7.3
All Others	622	12,562	5.0
Total	3,118	23,186	13.5

Source: Data for all states except Pennsylvania are based on a tabulation of reported mileage by all carriers reporting mileage in Pennsylvania for carrier fuel use tax purposes, prepared by Michele Gross, Pennsylvania Department of Revenue. (See Gross Affidavit, paragraph 6 .) All vehicles over 17,000 pounds gross registered weight are required to report, except for vehicles declared to have 90 percent or more of their mileage in Pennsylvania. Mileage by such vehicles was estimated by Sydec from the sample survey compiled by the U.S. Census Bureau as part of the 1972 Truck Inventory and Use Survey. Mileage for these vehicles was then added to the tabulation produced by Michele Gross for Pennsylvania trucks.

EXHIBIT S-5

SUMMARY TABULATION OF REPORTED OUT-OF-STATE MILEAGE
FOR VARIOUS TYPES OF TRUCKS BASED IN PENNSYLVANIA

Type of Trucks	Total Annual Mileage (millions)[1]	Proportion of Reported Mileage Falling in Ranges of Percent of Mileage Out-of-State[1]				Approximate Percent Out-of-State Mileage[2]
		0-25%	26-50%	51-75%	76-100%	
Single Unit Trucks:						
2 axle	1,330	85%	9%	3%	3%	12%
3 axle	205	82	9	9	1	13
Other	117	96	4	0	0	6
Combinations:						
3 axle	44	39	20	28	12	40
4 axle	406	31	30	29	10	42
5 axle	1,730	19	25	27	29	54
Other	87	16	50	18	15	43
All Trucks	3,916	49	19	17	15	36
All Trucks Except Single Unit 2 axle	2,587	30	25	24	22	47

[1]/Calculated by Sydec from the sample survey data compiled by the U.S. Census Bureau as part of the 1977 Truck Inventory and Use Survey for heavy vehicles (excludes trucks of 14,000 pounds or less).

[2]/Estimated by Sydec based on the data reported in the preceding columns.

EXHIBIT S-6

SUMMARY TABULATION OF REPORTED OUT-OF-STATE MILEAGE
FOR VARIOUS TYPES OF TRUCKS IN THE SIX STATES SURROUNDING PENNSYLVANIA

Type of Trucks	Total Annual Mileage (millions)[1]	Proportion of Reported Mileage Falling in Ranges of Percent of Mileage Out-of-State[1]				Approximate Percent Out-of-State Mileage[2]
		0-25%	26-50%	51-75%	76-100%	
Single Unit Trucks:						
2 axle	4,987	77%	13%	5%	5%	20%
3 axle	741	79	12	6	2	18
Other	96	84	12	4	0	15
Combinations:						
3 axle	222	43	20	24	13	38
4 axle	1,481	40	27	18	15	38
5 axle	3,734	20	18	29	34	58
Other	326	27	34	21	18	45
All Trucks	11,588	52	17	15	16	35
All Trucks Except Single Unit 2 axle	6,601	33	20	23	24	46

[1]/Calculated by Sydec from the sample survey data compiled by the U.S. Census Bureau as part of the 1977 Truck Inventory and Use Survey for heavy vehicles (excludes trucks of 14,000 pounds or less).

[2]/Estimated by Sydec based on the data reported in the preceding columns.

EXHIBIT S-7

AVERAGE WEIGHTS OF PENNSYLVANIA TRUCKS BY VEHICLE TYPE FOR LOADED AND UNLOADED TRUCKS IN 1975, 1976, AND 1978

Load Status	Year Weighed	Average Weights in Thousands of Pounds				
		Single Unit Trucks		Tractor-Semitrailer Combinations		
		2 axle 6 tire	3 or more axles	3 axle	4 axle	5 or more axles
Loaded	1978	13.7	40.6	27.4	40.4	58.8
"	1976	11.8	38.0	31.2	40.9	60.1
"	1975	16.0	34.2	28.9	39.0	56.9
Empty	1978	10.0	21.6	25.1	28.7	32.1
"	1976	7.3	19.8	23.3	27.7	33.2
"	1975	10.9	19.5	21.5	26.9	33.2
All Vehicles 1/	1978	11.8	30.8	26.7	37.1	51.4
" "	1976	11.0	30.7	29.2	37.8	53.3
" "	1975	13.7	26.6	26.8	35.6	50.3

1/ Estimated based on nationwide averages of the percentages of loaded single unit trucks and combinations for each of the three years.

Source: 1975-1979 National Truck Characteristics Report, U.S. Department of Transportation, Federal Highway Administration, June 1981, pages 73, 78, 79, 147, and 153.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 267 C.D. 1983

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,
Petitioners

v.

ROBERT K. BLOOM, Secretary of the Department of Revenue et al.,
Respondents

AFFIDAVIT

[In Support of Respondents' Motion for Summary Judgment]

I, James I. Scheiner, state that the following facts are true and correct to the best of my knowledge, information and belief.

1. I am the Secretary of the Commonwealth of Pennsylvania, Department of Revenue and have occupied this position since January 14, 1983.

2. As Secretary of Revenue it is my duty to administer and collect state taxes including the axle tax imposed by Chapter 99 of the Vehicle Code.

3. The axle tax first became effective on April 1, 1983 and is imposed on carriers who operate vehicles in excess of 26,000 pounds gross weight or registered gross weight on the highways of Pennsylvania.

4. The rate of tax is $36 per axle which is imposed annually at the time of motor vehicle registration for Pennsylvania-registered vehicles or at the time of application for a motor carriers road tax identification marker for vehicles registered in states other than Pennsylvania. For motor vehicles traveling less than 2,000 miles an-

nually in Pennsylvania, a rebate is provided in accordance with the following formula:

$$\frac{2{,}000 - \text{actual miles travelled}}{2{,}000} \times \text{axle tax paid} = \text{rebate.}$$

5. The existing processing and collection system of the Department of Revenue for motor carriers road tax is employed to process and collect the axle tax from out-of-state registered vehicles. Since all out-of-state registered vehicles subject to the axle tax are required to apply for and obtain motor carriers road tax identification markers, collection of the axle tax is implemented by simply adding additional lines on the road tax marker application form to identify the number of vehicles in excess of 26,000 pounds in each axle category.

6. Axle tax payment information is recorded on the Department of Revenue records by inserting the data into the existing motor carriers road tax account structures.

7. The existing motor vehicle registration system of the Department of Transportation is employed to collect the axle tax on motor vehicles which are registered in Pennsylvania. This is accomplished by a slight modification of the registration renewal card to allow the carrier to indicate the number of axles and the amount of axle tax due on each vehicle. On new registrations the axle tax information is submitted simultaneously with the application for registration.

8. Axle tax payment information on Pennsylvania-registered vehicles is recorded by adding the tax information to the existing Department of Transportation records relative to each registered vehicle.

9. To evidence payment of the axle tax with respect to a vehicle and to facilitate visual enforcement of the axle tax, each motor vehicle for which the tax is paid is required to display an axle tax marker showing the number of axles for which tax has been paid.

10. For out-of-state registered vehicles, the issuance of the axle tax markers has been integrated with the existing process for issuing motor carriers road tax identification markers. For 1984 the axle tax identification marker and the road tax identification marker was combined into a single marker. For 1983, a separate axle tax marker was required to be placed upon the 1983 road tax identification marker, which because of time restraints could not be modified to combine the two. The 1983 road tax marker and axle tax markers were transmitted simultaneously to each carrier.

11. For Pennsylvania-registered motor vehicles, the issuance of the axle tax identification marker has been incorporated into the existing motor vehicle registration process of the Department of Transportation. An axle tax marker is mailed to the registrant of the vehicle along with the validated motor vehicle registration and license plate sticker.

12. Motor carriers eligible for a rebate because a vehicle travels less than 2,000 miles in Pennsylvania during the applicable axle tax period are required to file with the Department of Revenue a notice of intent to apply for a rebate during the 10th month of the tax period (the notice of intent is required only for the 1983 axle tax year) and an application for a rebate within 90 days following the end of the tax period. The notice of intent and application for a rebate information is recorded on computer. Rebates are issued by the Department of Revenue and audits are conducted on a selective basis.

13. A temporary permit, authorizing the operation of a motor vehicle for five consecutive days without payment of the axle tax and without display of the axle tax and motor carriers road tax identification marker may be obtained through authorized wire service agents at a fee of $25 plus the agent's charge for the wire service.

14. The axle tax is enforced by the Pennsylvania State Police, the Department of Revenue enforcement agents, and the local police. Operation of a motor vehicle without a required axle tax identification marker subjects the operator to a fine of not less than $200.

15. Neither the Department of Revenue nor the Department of Transportation hired any additional personnel to administer the axle tax. There was no need for additional appropriations for either agency to pay for minor additional costs of axle tax marker printing. Axle tax markers were mailed to out-of-state licensees along with motor carrier road tax markers, and to Pennsylvania licensees along with motor vehicle license renewals.

16. Axle tax revenues for fiscal year 1982-83 and fiscal year 1983-84 are as follows:

	Trucks registered in Pennsylvania	Trucks registered other than Pa.	Temporary Permits	Fines	Total
1982-83	$ 8,684,008	$45,292,372	$1,147,855	—	$55,124,235
1983-84	$12,314,308	$62,088,820	$4,547,849	$1,448,872	$80,399,849

The Department of Revenue is in the process of paying axle tax rebates for the April 1, 1983 to March 31, 1984 period and estimates that rebates will total about $6,000,000.

/s/ James I. Scheiner
JAMES I. SCHEINER

Sworn to and subscribed before
me this 10th day of August, 1984.

/s/ Barbara W. Furjanic
NOTARY PUBLIC

BARBARA W. FURJANIC
Notary Public, Swatara Township, Dauphin County
My Commission Expires May 30, 1988

AFFIDAVIT

[In Support of Respondents' Motion for Summary Judgment]

I, ROY TAYLOR, state that the following facts are true and correct to my personal knowledge.

1. I am employed by the Commonwealth of Pennsylvania Department of Transportation. I hold the position of Director of the Center for Program Development and Management. I have held this position for approximately 1½ years.

2. Immediately prior to entering this position I was Division Chief of PennDOT's Highway Program Development Division. I held that position for 1½ years.

3. In my capacity as Director of the Center for Program Development and Management, and in my previous position (see ¶ 2 above), I have been involved in, among other things, the planning, development and implementation of the bridge repair and replacement program which is funded with Axle Tax revenues ("Billion Dollar Bridge Program").

4. Under this bridge program (see ¶ 3), Axle Tax revenues will fund the Commonwealth's share of a program to restore or replace 979 bridges on Pennsylvania's state, county and municipal roads. Expenditures under this program will exceed $1 billion. The bridge projects funded by the Axle Tax will be initiated over the next five years. The specific bridges which have been authorized for repair or replacement are identified in Act 1982-235, the "Highway-Railroad and Highway Bridge Capital Budget Act for 1982-1983."

5. Over the projected six-year life of the program, the Commonwealth will spend approximately $800 million for bridge repair and replacement. This amount will be supplemented by some $420 million in federal aid and $40 million in local government expenditures.

/s/ Roy W. Taylor
ROY TAYLOR

Sworn to and subscribed
before me this 17th day
of August, 1984.

/s/ Stacia Lee Ferretti
NOTARY PUBLIC

STACIA LEE FERRETTI
Notary Public,
My Commission
Expires Oct. 29, 1984
Harrisburg, PA Dauphin County

AFFIDAVIT

[In Support of Respondents' Motion for Summary Judgment]

I, JOHN W. FISHER, state that the following facts are true and correct to my personal knowledge.

1. I have been a member of the Lehigh University faculty since 1964 and was promoted to Professor of Civil Engineering (my current position) in 1969. Prior to joining the Lehigh staff, I was Assistant Bridge Research Engineer with the National Academy of Sciences. A resume of my experience is attached as Exhibit "A" below.[1]

2. As the attached resume shows, I am a structural engineer specializing in bridge structural connections, fatigue and fracture resistance of riveted, bolted and welded bridge connections, and the behavior and design of composite steel-concrete bridge members.

3. In simple terms, the two key elements which affect the design, and thus the cost, of bridges are: the "dead load," or the stress produced by the mass of the bridge structure itself; and the "live load," or the stress produced by the weight of the vehicles on the bridge, including the "impact", or stresses resulting from the movement of vehicles on the bridges. Bridges are designed so that under the total loads they are subjected to (dead load, live load, and impact) over a projected period of time ("design life"), they have an acceptable margin of safety against the "limits of structural usefulness," or load-bearing capacity of the bridge's structural members.[2] The more load a bridge must withstand, the stronger the bridge must be, and the greater its construction cost will be.

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[1] Exhibit "A" and Appendix "A," refered to in and attached to this Affidavit, are incorporated in this Affidavit by reference, as though fully set forth.

[2] Tall et al. Structural Steel Design, 2nd Edition, Ronald Press Co., N.Y., 1974.

4. Adequate strength is necessary to insure safe passage or traffic across the bridge. However, there are a number of other requirements relating to bridge performance: for example, the bridge's vibration must not annoy users, it must stay in service for a number of years without excessive maintenance, and it must be resistant to cracking and other structural deterioration.

5. The projected "live loads" for which bridge structures of various types are designed are found in design specifications issued by the American Association of State Highway and Transportation Officials ("AASHTO"). The AASHTO specifications are used in the design of bridges by state highway departments throughout the United States.

6. The first edition of the AASHTO (previously "AASHO") Specification for Highway Bridges was published in 1931. In that specification, design live loads were based upon expected use of bridges by 10, 15 or 20 ton trucks ("H-loading"). The 1941 AASHTO specification introduced design live loads based upon expected bridge use by 72,000 pound trucks ("HS loading") (for tractor truck and semitrailer), but use of this loading by bridge designers was optional.

7. The 1944 edition of the AASHTO specification introduced "variable spacing" between the drive and trailer axles for the HS loading, and required its use. The H and HS loadings have remained the same up to the 12th edition of the AASHTO specification in 1977.[2]

8. Since 1977, several states have adopted the "HS-25" design live load. The HS-25 loading is based upon expected use of bridges by 90,000 pound trucks. The states which have adopted HS-25 truck loading include

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[2] The American Association of State Highway and Transportation Officials, Standard Specifications for Highway Bridges, AASHTO, 12th Ed., 1977, Washington, D.C.

Idaho, Maine, Michigan, New York, Oregon, Pennsylvania and Vermont.

9. The changes in design truck loading which have taken place since 1931 (see paragraphs 6-8 above) reflect the necessity to increase the design load as truck traffic weight increases. The increased traffic load requires more bridge strength, to resist the resulting increase in forces that the bridge will experience. This increases the construction cost of the bridge.

10. One of the most important performance criteria that a bridge must be designed for is fatigue strength. The fatigue life of a bridge depends primarily on the weight, distribution, and number of vehicles passing over the bridge, and on the characteristics of the bridge "details", which include, for example, welded, riveted or bolted connections.[3]

11. Metal fatigue is caused in bridges by cycles of increased stress whenever heavy vehicles use the bridge. The effect of these "stress cycles" is cumulative, and in time will lead to cracks in the metal, particularly at welded connections. This is true of both steel and concrete bridges. Eventually, bridge components will crack unless the allowable vehicle weight is reduced or costly repairs are undertaken.

12. Measurements on bridge structures have demonstrated that cars do not cause significant stress cycles as a result of passing over the bridge. All significant stress cycles are produced by the trucks that cross the bridge. Generally trucks must exceed 20,000 pounds before stress cycles are significant.[4]

13. In order to minimize the possibility of fatigue cracking it is necessary to adjust the size of bridge com-

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[3] Fisher, J. W. Bridge Fatigue Guide-Design and Details, AISC, Publication T 112-11/77, 1977.

[4] See n. 3 above.

ponents so that the range of stress cycles caused by vehicular traffic is decreased at commonly used details. This results in increased bridge component size and in the additional costs associated with bridge details that provide higher fatigue resistance. Unless these precautions are taken, the bridge will eventually crack, unless the allowable vehicle weight is reduced.

14. Many existing bridges have details now known to be susceptible to fatigue damage. As a result it is necessary to repair or "retrofit" these bridge structures, or they will eventually crack. This situation becomes more acute with heavier truck loads.

15. Fatigue damage in bridges increases with the third power of gross vehicle weight. Thus, for example, a 60,000 pound vehicle causes of 27 times the fatigue damage of 20,000-pound vehicle. The technical underpinnings of this statement are provided in Appendix A, below.

16. Fatigue damage—which increases significantly as vehicle weight increases—appears to be the major cause of bridge deterioration,[5] with the exception of deterioration caused by natural disasters and ship collisions.

17. Although total failure (*i.e., collapse*) of the bridge structure is rare, fatigue cracking is often responsible for posting or closing the structure, reducing the number of lanes that are usable, or other temporary measures until repairs or corrective action can be taken. Cracks in the steel structure place it at risk to more serious damage.[6]

18. While there are other factors which affect bridge deterioration, under certain conditions and with regard

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[5] This includes deterioration of both metal and concrete components.

[6] Fisher, J.W. Fatigue and Fracture in Steel Bridges, Wiley Interscience, May 1984.

to certain parts of the bridge structure—for example, wind stress—these factors play relatively minor roles compared to the matters described above.

/s/ John W. Fisher
JOHN W. FISHER

Sworn to and subscribed
before me this 21st day
of August, 1984

/s/ Margaret A. Holzer
NOTARY PUBLIC

MARGARET A. HOLZER
Notary Public
Bethlehem, Northampton County
My Commission expires July 29, 1985
Member, Pennsylvania Association
of Notaries

APPENDIX A

Since bridge structures are subjected to loads at variable times and with different characteristics and magnitude, random variable loading results. This causes cumulative damage from the variable stress cycles. The linear damage rule of Miner is given by

$$\sum \frac{n_i}{N_i} = 1 \qquad (1)$$

The damage accumulation law ratio n_i/N_i is the incremental damage that results from the stress range cycles Sri that occurs n_i times.

The fatigue life of a given detail, Ni is related to stress range, Sri as

$$N_i = A.\, S_{ri}^{-3} \qquad (2)$$

where A is a function of the type of detail.

Hence, Miners law can be used to express cumulative damage as

$$F = \frac{1}{A} \sum n_i\, S_{ri}^{\,3} \qquad (3)$$

when equations 1 and 2 are combined.

Since stress range Sri in the bridge is proportional to Gross Vehicle Weight (i.e. $Sri = \alpha\beta GVWi$), then fatigue damage in bridges increases with the third power of the gross vehicle weight. Thus a 60,000 lb. truck causes 27 times the fatigue damage of a 20,000 lb. truck. Smaller trucks and automobiles generally cause stress cycles below the fatigue crack growth threshold and do not affect the fatigue life nor contribute significantly to fatigue damage.

AFFIDAVIT

[In Support of Respondents' Motion for Summary Judgment]

I, STEPHEN R. SIMCO, state that the following facts are true and correct to my personal knowledge.

1. I am employed by the Pennsylvaia Department of Transportation ("PennDOT"). I hold the position of Acting Chief Bridge Engineer, and have been in this position since 1983. I have been a bridge engineer with PennDOT since 1960.

2. I received my Bachelor of Science degree in Civil Engineering from Pennsylvaia State University in 1950. I am a registered professional civil engineer.

3. My responsibilities as Acting Chief Bridge Engineer at PennDOT include keeping PennDOT's bridge design and construction methods up to the "state of the art." I have primary responsibility within PennDOT for this task. I am very familiar with the bridge design and construction procedures used by PennDOT, and, as part of my job responsibilities, I keep abreast of the deveolpments in this field.

4. I have reviewed the Affidavit of Professor John W. Fisher. I agree in full with the analysis set out in Professor Fisher's affidavit (regarding bridge design, construction, deterioration and repair).

5. PennDOT applies the principles summarized in Professor Fisher's Affidavit in PennDOT bridge projects on Pennsylvania's highways. Thus, for example, projected heavy truck traffic is the primary factor taken into account in the design of bridges in Pennsylvaia. Use of bridges by cars causes no significant bridge deterioration.

6. In addition, PennDOT designs bridges which will be used by heavy trucks with, among other things, wider

lanes than would be the case if only cars were to use them.

/s/ Stephen R. Simco
STEPHEN R. SIMCO

Sworn to and subscribed
before me this 20 day
of August, 1984.

/s/ Earl M. Kerstetter
NOTARY PUBLIC

EARL M. KERSTETTER
Notary Public
Mt. Pleasant Mills, Snyder Co., Pa.
My Commission Expires April 18, 1987

AFFIDAVIT

[In Support of Respondents' Motion for Summary Judgment]

I, WALTER P. KILARESKI, state that the following facts are true and correct to my personal knowledge.

1. I am an Assistant Professor of Civil Engineering at Pennsylvania State University. I have held this position since 1980. My area of specialization is the field of pavement design and rehabilitation.

2. I am a registered professional engineer in the Commonwealth of Pennsylvaia. A short resume of my experience is attached as Exhibit "A" below.[1]

3. Certain design procedures are widely used by pavement engineers. These include the American Association of State Highway and Transportation Officials (AASHTO) procedure, the Asphalt Institute procedure, and the Portland Cement Association procedure.

4. The AASHTO design procedure is a result of a carefully executed experiment conducted at the AASHTO Road Test in the late 1950's and early 1960's, in which vehicles carrying different axle loads were run over various types of pavements for 2 years. AASHTO results are accepted as valid within the field of pavement design.

5. The AASHTO Road Test established, among other things, that as axle loads accumulate, pavement deteriorates.

6. Axle load refers to the load carried by a vehicle axle and transmitted to the pavement structure by that axle. Mixed axle loads can be equated in units called Equivalent Axle Loads (EAL's). One passage over a road segment of a single axle and tires with total weight of 18,000 pounds produces 1 EAL. All other axle loads

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[1] Exhibit "A", attached to this Affidavit, is incorporated in the Affidavit as though fully set forth.

are related to the 18,000 pound load in terms of that basic unit.

7. As the weight placed on an axle is increased, the number of EAL's produced by the axle increase exponentially. The greater the number of EAL's produced by a vehicle, the greater the pavement damage that vehicle will produce. This will increase the rate of serviceability loss for the pavement structure.

8. The pavement damage caused by automobiles is almost insignificant compared to that caused by trucks. Automobiles produce in the range of .0002 to .0004 EAL's. A 73,280 pound tractor trailer can (depending on how much weight is borne by each axle) produce approximately 5.2 EAL's.

9. The AASHTO Road Test established that as EAL's accumulate, a pavement's serviceability decreases to the point where the pavement can no longer function. When a pavement's serviceability has decreased to a certain level, the pavement should be overlaid with another layer of asphalt or portland cement concrete, or be rehabilitated in some other way, to keep it in usable condition. Overlaying and other rehabilitation methods entail significant construction costs.

10. Although other factors contribute to pavement deterioration (environmental factors, including weather), the deterioration which necessitates these rehabilitation expenditures is attributable primarily to heavy trucks.

11. I have conducted experiments which are very similar to the AASHTO Road Test, and confirm its results.

12. Other accepted design procedures—the Asphalt Institute and Portland Cement Association design procedures—also require that the designer predict the number of EAL's which the pavement will carry. That is, other accepted design procedures also treat expected truck traf-

fic as the central factor to be considered in pavement design.

13. The expected volume of automobile traffic is not taken into account, because it has a very insignificant effect on pavement thickness.

14. In addition to requiring thicker pavements, trucks require that roads have wider shoulders, and less steep grades, than if only cars used them. These alterations increase the cost of building a highway.

/s/ Walter P. Kilareski
WALTER P. KILARESKI

Sworn to and subscribed
before me this 21st day
of August, 1984.

/s/ Vickie M. Green
NOTARY PUBLIC

VICKIE M. GREEN
Notary Public
University Park, Centre Co., Pa.
My Commission Expires Jan. 3 1987

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 267 C.D. 1983

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,
Petitioners

v.

ROBERT K. BLOOM, Secretary of the Department of Revenue, et al.,
Respondents

AFFIDAVIT

[In Support of Respondents' Motion for Summary Judgment]

I, Joseph H. Reohr, Jr., state that the following facts are true and correct to the best of my knowledge, information and belief.

1. I am employed by the New York State Department of Taxation and Finance. I hold the position of Assistant Director of the Central Office Audit Bureau. I have held this position since 1979. Since August 1, 1952 I have had an active role in the administration of the New York truck mileage tax contained in Article 21 of the Tax Law, Chapter 60, Consolidated Laws of New York.
2. In the capacity of Assistant Director my present responsibilities concern primarily the desk auditing of tax returns including those filed under the truck mileage tax. I have previously worked in other audit and processing areas of the truck mileage tax and am familiar with the administration of the truck mileage tax.
3. The truck mileage tax was first imposed in October of 1951.

4. The tax is imposed upon carriers who operate vehicles which alone or in combination have a gross weight in excess of 18,000 pounds and which operate on New York highways.

5. Carriers subject to the tax are required to obtain a permit and sticker for each vehicle operated in New York. Vehicles subject to the permit and sticker requirements include trucks, truck tractors, and trailers.

6. A permit and sticker is currently issued to each vehicle for a total fee of $5. The permit is valid for the period of the series in which issued, which is three years, and may be renewed currently for a fee of $2. The permit identifies the carrier's name and address; the make, type, year, and serial number of the vehicle; unloaded weight of the vehicle; and the maximum gross weight of the vehicle. The permit must be carried at all times in the vehicle and displayed upon the request of any authorized person. The sticker must be affixed to the vehicle to which it was issued. The information on the permit is also contained in the Department's computer file and available to authorized personnel via video display terminals.

7. The carrier to whom the permit is issued is responsible for filing the truck mileage tax report for the operation of that vehicle.

8. At the present time, approximately 82,000 carriers are registered with a total of 1,756,000 vehicles, which includes trailers.

9. Temporary permits valid for 30 days are issued by telegraphic facsimile for a fee of $5. Temporary permits automatically are converted to a permanent permit and sticker.

10. The truck mileage tax and the fuel use tax are reported on one report form. Returns are filed

quarterly unless the carrier has a truck mileage tax liability in excess of $100 per month, in which case truck mileage tax returns are filed monthly for that tax.

11. Failure to file reports or to pay assessments can result in suspension of the permits, which may then subject the carrier to a minimum fine of $100 if the vehicle is operated under a suspended permit. A minimum fine of $100 is also imposed for operating a vehicle without the required permit and sticker.

12. The Division of State Police is the principal enforcement agency of the truck mileage tax. Local police may also enforce its provisions.

13. Noncompliance in the case of a New York State commercially registered vehicle may result also in the suspension of the vehicle's New York State registration.

14. The carrier may compute the truck mileage tax by using one of two methods.

15. The unloaded weight method involves multiplying the total mileage in New York State, except certain thruway mileage, by a tax rate which is determined with reference to the empty weight of the power unit. New York State's gross weight limit for a tractor-trailer combination is 80,000 pounds. The maximum rate under the unloaded weight method is currently 2.7¢ per mile for trucks over 25,000 pounds unloaded or truck-tractors over 12,000 pounds unloaded.

16. The gross weight method involves trucks and tractor-trailer combinations with a maximum gross weight in excess of 18,000 pounds. When the truck is laden, the tax is computed using a rate per mile based upon the maximum gross

weight of the vehicle. When the truck is unladen, the rate is based upon the unloaded weight. The same rate table is used for laden and unladen mileage. The gross weight method uses a schedule of tax rates which differs from the schedule used under the unloaded weight method. The rate under the gross weight method applicable to tractor-trailer combinations with a gross weight of 78,001 to 80,000 pounds is currently 3.9¢ per mile.

17. Under the gross weight method the carrier must account separately for laden and unladen mileage. If tractor-trailer combinations are used, mileage must be kept for each different combination of tractor and trailer unless the carrier chooses the option of computing the tax with reference to the mileage of each trailer using the tax rate applicable to the combination weight of the trailer and the heaviest unloaded tractor.

18. The following numbers of personnel are involved in the administration and collection of the truck mileage tax:

Central Office Audit Bureau for desk audits	7
District offices for field audits	40
Processing Division for filing, mailing, computer	63

19. The desk audit involves a manual examination of reported combination weights by comparison with the weights indicated on the permits.

20. Mileage and declared weight are audited in the field audits.

21. Of the approximately 82,000 carriers registered, approximately 26,000 are located in New York State.

22. Of the 1.7 million vehicles registered, over one-half are trailers.

23. Carriers are required to maintain trip records for the movement of each truck or truck-tractor showing the point of origin, destination, date, vehicle permit number, laden and unladen miles.

24. The revenue yield for the truck mileage tax has been:

FYE 84	$37.8 million
FYE 83	35.5 million
FYE 82	36.9 million

25. The cost of administration was estimated at 5% of total revenue for FYE 83. The cost breakdown was as follows:

Assessment and collection	2.9%
Audit	2.1%

26. Enforcement problems include apprehending suspended carriers, currently 14% of all accounts; detecting overloading where trucks underreport weight.

27. Auditors are also located in Illinois to facilitate auditing.

28. In the 1950's the truck mileage tax was enforced by using weigh stations to check all trucks traveling within the state. This method was found to become less and less cost effective as willful violators would simply detour around weigh stations and road blocks.

/s/ Joseph H. Reohr, Jr.
JOSEPH H. REOHR, JR.

Sworn to and subscribed before
me this 8th day of August, 1984.

/s/ Thomas C. Sacca
NOTARY PUBLIC

THOMAS C. SACCA
Notary Public, State of New York
No. 4696948
Qualified in Albany County
Commission Expires March 30, 1985

AFFIDAVIT

[In Support of Respondents' Motion for Summary Judgment]

I, WARREN F. KONE, state that the following facts are true and correct to my personal knowledge, unless otherwise specifically stated:

1. I am employed by the Commonwealth of Pennsylvania Department of Transportation ("PennDOT"). I hold the position of Transportation Planner in PennDOT's Bureau for Strategic Planning, Transportation Analysis Section. I have held this position since 1972.

2. In this position I participate in special projects aimed at evaluating possible improvements to Pennsylvania's highway system, among other duties.

3. Federal law, specifically the Surface Transportation Act of 1982, requires each state to designate routes to be included in a highway system known as the "National Truck Network" ("NTN"). These routes must, in addition to meeting other requirements, provide reasonable access to the state's interstate highway system.

4. Following the passage, in 1982, of the Surface Transportation Act, Pennsylvania determined which of its roadways should be designated as NTN routes. I participated in this determination.

5. Pennsylvania's federally-approved NTN system includes the entire interstate system (1,502 miles); portions of other four-lane, divided, limited access highway (500 miles); and portions of four-lane, 48-foot minimum width roads (146 miles). Travel is also permitted for 2/10 mile off the NTN network for access to terminals and to food, fuel and rest facilities, if the access road has lanes at least 12′ wide.[1]

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[1] This specific information is derived from an official publication of the Department of Transportation entitled *Truckers' Handbook*, at p. 49 (Fourth Edition, January, 1984).

6. In the course of determining which of Pennsylvania's roadways should be designated as NTN routes (see paragraph 4 above), PennDOT reviewed data from various sources. One important source of information on roadway usage and condition which I, and others involved in this task, used, was data which had been gathered regarding highways located on Pennsylvania's "Priority Commercial Network" ("PCN").

7. The PCN consists, essentially, of about 11,600 miles of roadways made up of (1) roads which carry more than 500 trucks per day, and (2) connector roads of particular significance to industry.

8. The PCN was developed by PennDOT in order to identify the network of highways which is most frequently used by commercial truck traffic. The stated aim of the PCN projects was, generally speaking, to enable PennDOT to identify deficiencies which impede commercial truck travel. *See*, "Pennsylvania Priority Commercial Network Development and Applications," an official PennDOT publication (August, 1983).

9. I was asked, in connection with this case, to determine, among other things, how many bridges among those scheduled to be repaired or replaced with Axle Tax funds are located on the PCN. In order to do this, I directed PennDOT personnel under my supervision to run the computer program which identifies these bridges (and gives other information about them) against the program which identifies the PCN. (These computer programs are PennDOT business records).

10. The list generated by this process (see ¶ 9 above) shows that 235 of the bridges scheduled for repair or replacement using Axle Tax funds are located on the PCN.

11. This computer list (see ¶ 9 above) also shows that funds to be spent on improving or replacing the 235

bridges located on the PCN will total approximately $744 million; of this amount, $177 million will consist of Axle Tax revenues. Approximately seventy (70) of these 235 bridges located on the PCN are currently closed to heavy vehicles ("posted") or closed completely. (This number changes as projects are completed.)

12. The computer printout identifying "Axle Tax program" bridges on the PCN (See ¶ 9 above) also shows the weight limit to which these bridges currently are posted, whether the bridge is closed, average daily traffic, and the one-way length of detour around posted or closed bridges. I provided this information for use by experts and others in this litigation.

13. I have prepared a map showing the approximate location on the PCN of the presently posted and closed bridges which will be repaired or replaced with Axle Tax revenues. A copy of this map, labeled Exhibit A, is attached to this Affidavit and incorporated in the Affidavit by reference.

/s/ Warren F. Kone
WARREN F. KONE

Sworn to and subscribed
before me this 9th day
of August, 1984.

/s/ William B. Garman
NOTARY PUBLIC

WILLIAM B. GARMAN
Notary Public
Boiling Springs, Cumberland Co., PA
My Commission expires May 3, 1986.

PRIORITY COMMERCIAL NETWORK

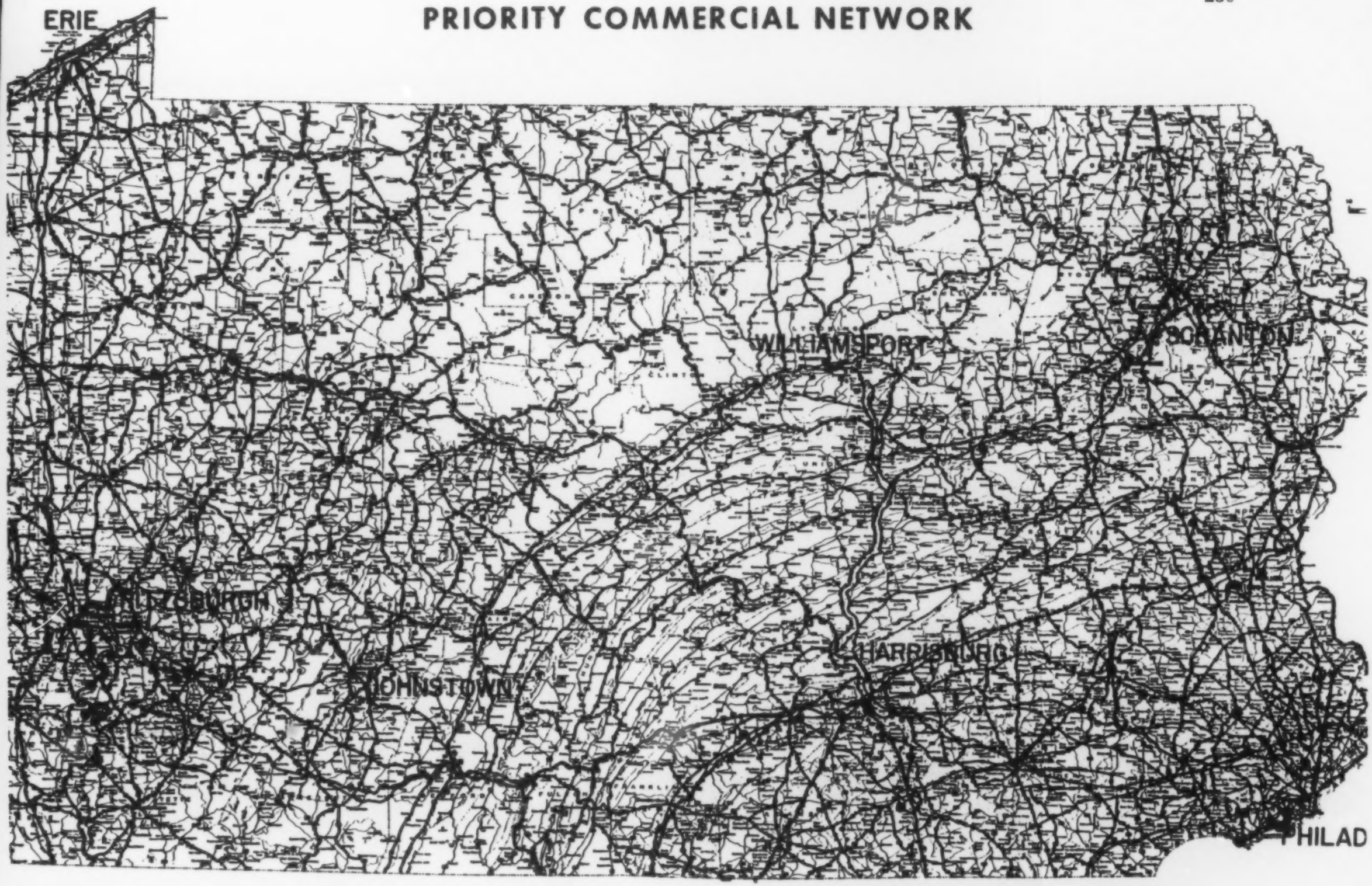

EXHIBIT "A"

BEST AVAILABLE COPY

AFFIDAVIT

[In Support of Respondents' Motion for Summary Judgment]

I, Linley Oberman, state that the following facts are true and correct to my personal knowledge:

1. I am employed by the Commonwealth of Pennsylvania Department of Transportation ("Department"). I hold the position of Manager of the Commercial Registration Section, within the Bureau of Motor Vehicles. I have held this position since 1981.

2. My current responsibilities include, among others, overseeing the administration of the Department's registration programs for commercial vehicles. These programs are (1) International Registration Plan (IRP), or "apportioned," registration of vehicles, and (2) conventional, or "non-apportioned" registration of vehicles.

3. I have determined, based upon the Department's computerized business records, that for approximately 65% of all non-apportioned-registered vehicles registered in Pennsylvania which are subject to the Axle Tax, Axle Tax payments exactly equal the registration fee reductions effected by Act 1982-234. I was able to make this determination using the Department's business records showing (1) number of vehicles registered in each vehicle weight class, and (2) number of axles possessed by vehicles registering in each vehicle weight class.

4. At my direction, staff in the Bureau of Motor Vehicles' Financial Analysis Section derived from the Department's computerized business records a tabulation showing number of truck registrations at 73,280 pounds or over in Pennsylvania, for the years 1978-1984. I reviewed this tabulation and determined that it was prepared correctly. I then provided it for use by experts and others in this litigation. This tabulation is reflected accurately in Exhibit R-7 of Mr. Arlee Reno's Affidavit (located at page R-25 of Mr. Reno's Affidavit).

5. I have prepared for use by experts and others in this litigation, from the Department's computerized business records, a tabulation showing annual mileage reported to the Department by 2,572 motor carriers registering vehicles in Pennsylvania under the IRP; this tabulation covers 16,174 power units of over 26,000 pounds registered weight. This tabulation is reflected accurately in Exhibit S-3 of Dr. Joseph Stowers' Affidavit. (Exhibit S-3 is located at page S-6 of Mr. Stowers' Affidavit.)

6. Pennsylvania requires by law that motor carriers which have their principal place of business in the Commonwealth register their locally-based fleet in Pennsylvania. See 75 Pa. C.S. § 1303(c).

/s/ Linley Oberman
LINLEY OBERMAN

Sworn to and subscribed
before me this 22nd day
of August, 1984.

/s/ Lois Erb
NOTARY PUBLIC

LOIS ERB
Notary Public
My Commission Expires August 18, 1986
Harrisburg, PA Dauphin County

AFFIDAVIT

[In Support of Respondents' Motion for Summary Judgment]

I, PAUL M. SLOAD, JR., state that the following facts are true and correct to my personal knowledge.

1. I am employed by the Commonwealth of Pennsylvania Department of Revenue ("Department"). I serve as Chief of the Licensing and Examinations Division, Bureau of Motor License Funds, within the Department. I have held this position since June, 1984.

2. Immediately prior to entering this position I was Assistant Chief of the Department's License and Bonding Division, Bureau of Accounts Settlement. I held this prior position for approximately five years.

3. In my current position I am responsible for overseeing the administration of certain taxes which are paid into the Commonwealth's Motor License Fund. These taxes include the Axle Tax, Liquid Fuels Tax, Fuel Use Tax, Oil Company Franchise Tax, "Interstate Bus Compart" Tax and Motor Carriers Road Tax ("MCRT").

4. The MCRT is a tax imposed upon motor carriers calculated on the amount of fuel consumed on Pennsylvania roads, with credit given against the MCRT for taxes paid at the pump on fuel purchased in Pennsylvania.

5. For Motor Carriers Road Tax purposes, motor carriers which operate vehicles travelling both in Pennsylvania and other states must, as a general matter, report their Pennsylvania and total vehicle mileage to the Department.

6. The exception to this general rule involves motor carriers operating vehicles registered in Pennsylvania which travel at least 90% of their miles in Pennsylvania, and which purchase enough fuel in Pennsylvania to cover their Pennsylvania mileage. Such motor carriers are not

required to report their mileage to the Department. Rather, they are permitted to submit to the Department an annual certification that their vehicles travel at least 90% of their miles in the Commonwealth, and that they purchase enough fuel in Pennsylvania to cover their Pennsylvania miles.

/s/ Paul M. Sload, Jr.
PAUL M. SLOAD, JR.

Sworn to and subscribed
before me this 21 day
of August, 1984.

/s/ Renee L. Smith
NOTARY PUBLIC

RENEE L. SMITH, Notary Public
Dauphin County, Harrisburg, PA
My Commission Expires May 12, 1985

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 267 C.D. 1983

CLASS ACTION

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,
Petitioners,

v.

ROBERT K. BLOOM, Secretary of the Department of Revenue, et al.,
Respondents.

AFFIDAVIT OF DOUGLAS A. HUGHES IN OPPOSITION TO RESPONDENTS' MOTION FOR SUMMARY JUDGMENT

I, DOUGLAS A. HUGHES, state that the following facts are true and correct to my personal knowledge:

1. I am the Director of the Department of State Laws of American Trucking Associations, Inc., and as such I am serving as representative of Petitioner American Trucking Associations, Inc. in this litigation. A resume of my experience is attached hereto as Exhibit A to this affidavit.

2. Petitioners have filed a Motion for Summary Judgment in No. 267 C.D. 1983 because the Axle Tax at issue facially discriminates against interstate commerce in that: (a) although the Axle Tax technically applies to Pennsylvania-registered and foreign-registered vehicles, the legislature eliminated the financial effort of the Axle Tax upon Pennsylvania-registered vehicles by concurrently decreasing the registration fees for those vehicles

in amounts which offset the Axle Tax; and (b) the Axle Tax purports to be a flat tax and therefore, violates the commerce clause because it is not fairly related to the services provided by the state.

3. Respondents have filed their own Motion for Summary Judgment and oppose Petitioners' Motion because, they argue, the Axle Tax in no way discriminates against interstate commerce.

4. In support of their position, Respondents state many alleged "facts" in their brief and in numerous and lengthy affidavits.

5. I have reviewed Respondents' brief and affidavits in support of their motion and in opposition to Petitioners' motion.

6. The main "factual" assertions made by Respondents are that: (a) most carriers, including foreign carriers, can benefit from the lowering of registration fees in Act 234 "because interstate motor carriers can, as a general matter, choose the base state of registration for their trucks from among many states" (Respondents' brief at 18), *i.e.*, carriers can and do "shop" for the least expensive state for registration; (b) the lowering of registration fees in Act 234 was designed to curtail Pennsylvania's loss of registrations due to high registration fees; (c) Act 234 can legitimately increase the tax burden selectively on foreign-registered vehicles because the owners of those vehicles pay the least to Pennsylvania, *i.e.*, no registration fee, and therefore they would otherwise get a "free ride" on Pennsylvania roads; and (d) heavy foreign vehicles cause more damage to Pennsylvania's bridges than Pennsylvania's heavy vehicles thereby justifying a greater contribution to the bridge improvement program created by Act 234.

7. Each of the above "factual" assertions, and the more detailed alleged "facts" and opinions on which they

are based, are disputed by Petitioners and are incorrect and misleading.

8. Without conceding the relevance of Respondents' assertions, they will be addressed below.

BACKGROUND

9. Every state maintains a system for registering trucks annually and imposes fees and taxes in conjunction with such registration.

10. Certain agreements have been devised and exist among states in connection with truck registrations.

11. Pennsylvania has reciprocity agreements with 20 states and the District of Columbia. All six states bordering on Pennsylvania—Delaware, Maryland, New Jersey, New York, Ohio and West Virginia—have reciprocity agreements with Pennsylvania. Under these agreements vehicles engaged in interstate travel which are properly registered in any of the jurisdictions with which Pennsylvania has reciprocity agreements may travel interstate in Pennsylvania without paying registration fees to Pennsylvania. By the same token, vehicles properly registered in Pennsylvania and engaged in interstate travel may travel in any of the jurisdictions with which Pennsylvania has reciprocity agreements without having to pay any registration fees to those jurisdictions. "Properly registered" in this context means that the vehicles are registered where they are operationally based. Of the 20 states with which Pennsylvania has reciprocity agreements, four have been recently admitted to the International Registration Plan (IRP), first apportionment to occur in 1985. *See* paragraph 13, below.

12. The allegation on page R-4 of the Reno affidavit and in paragraph 4 of the same affidavit—that "Pennsylvania grants full reciprocity for registration fee purposes to vehicles registered in [21 states, the District of Columbia and 6 Canadian provinces]" is incorrect in that the

number of states with which Pennsylvania has reciprocity is incorrect and this reciprocity is limited to *interstate* travel; *i.e.*, reciprocity would *not* be granted to a New Jersey vehicle performing Pennsylvania *intrastate* transportation.

13. In addition to reciprocity agreements, Pennsylvania belongs to the IRP, a multi-jurisdiction agreement, whereby vehicles, if properly registered in any of the member jurisdictions, pay apportioned registration fees to each of the IRP jurisdictions in which the vehicles travel in the year. The apportioned fee is based upon the proportion of miles traveled in those jurisdictions to the total miles traveled by the vehicles. For example, vehicles based in Kentucky (a member of the IRP) which travel 20% of their miles for the year in Pennsylvania, would pay 20% of the Pennsylvania registration fee.

14. The listing of IRP members from among those states belonging to the Multistate Reciprocity Agreement on page R-8 of the Reno affidavit is incomplete in that it does not include Florida and Michigan. In addition, both paragraph 5 and the first sentence concerning the IRP on page R-6 of the Reno affidavit are incorrect in that the IRP membership does not consist of Pennsylvania, *27* other states and the province of Alberta but rather, as of the date Mr. Reno signed his affidavit, Pennsylvania, *30* other states and the province of Alberta.

15. Pennsylvania is not a party to the Uniform Vehicle Registration Proration and Reciprocity Agreement (UPRA). However, all UPRA states, except Alaska and New Mexico, either have a reciprocity agreement with Pennsylvania or are also members of the IRP. Pennsylvania allows interstate vehicles registered in Alaska and New Mexico to travel in the Commonwealth without paying Pennsylvania registration fees, even though it does not have reciprocity agreements with either Alaska or New Mexico.

16. Pennsylvania is not a party to the Multistate Reciprocity Agreement (MRA). However, all MRA members either have a reciprocity agreement with Pennsylvania or are members of the IRP.

17. Therefore, Pennsylvania has some sort of registration fee agreement or arrangement with the District of Columbia and all states except Alaska, Hawaii and New Mexico. Additionally, Pennsylvania allows interstate vehicles registered in Alaska, Hawaii and New Mexico to travel in the Commonwealth without payment of Pennsylvania registration fees, even though there is no formal reciprocity agreement.

RESTRAINTS ON THE LOCATION OF REGISTRATION

18. Respondents state that the decreases in registration fees in Act 234 benefit more carriers than just Pennsylvania carriers because foreign carriers can shop for the best, *i.e.*, least expensive, state of registration and are free to register their vehicles in Pennsylvania. *See, e.g.*, Respondents' brief at 6-8, 18-19 and paragraphs 17 and 18 of the Reno affidavit.

19. If Respondents' position were correct, all interstate carriers would register in the low fee states (*i.e.*, Alaska, Delaware, New Mexico and Oregon) and none would register in the high fee states (*i.e.*, Arizona, Illinois, Iowa, Kansas and Wisconsin), which, of course, is not the case.

20. Rather, the vast majority of carriers are not free to shift their truck registrations to any other state at will because of both legal and economic restraints.

21. More specifically: (a) under the IRP and generally under reciprocity agreements vehicles can only be registered where the carrier has an established physical place of business; (b) some states, including Pennsylvania, mandate that locally-based trucks be registered in

that state if the carrier's principal place of business is there; and (c) even if a carrier has a choice of states for registration, that choice is influenced not only by registration fees but by ad valorem property tax costs and the reciprocity such registrations would receive in other states of travel.

22. It is probable that of the approximately 50,000 motor carrier operators serving Pennsylvania, less than 10% have any option of shifting their registrations because they do not have business locations, facilities and personnel in other states as set forth below.

23. Under the IRP provisions "base state" [1] means the state "where the registrant has an established place of business, where mileage is accrued by the fleet and where operational records of such fleet are maintained or can be made available" under special arrangements. *See* International Registration Plan, Article II.F. "Established place of business" is defined as:

> a physical structure owned, leased or rented by the fleet registrant the location of which is designated by street number or road location; and which is open during normal business hours; and in which are located:
>
> (1) a telephone or telephones publicly listed in the name of the fleet registrant,
>
> (2) a person or persons conducting the fleet registrant's business, and

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[1] Respondents have confused the issue by using the term "base state" in their brief in different ways without thorough explanation. On page 6, for example, they describe the term as meaning "the state which the carrier views as its 'home state'" while on page 8 they define the term by referencing the IRP; but they still have failed to define the term as provided in the IRP and as used in general context.

(3) the operational records of the fleet (unless such records can be made available in accordance with the provisions of Article XIV.A.2).

International Registration Plan, Article II.J.

24. Registration reciprocity granted to foreign registrations under non-IRP agreements is most commonly granted only to trucks properly registered in the "base state." In this context, "base state" means the place from or in which the vehicle is most frequently dispatched, garaged, serviced, maintained, operated or otherwise controlled by the registrant. This is true of all reciprocity states with the exceptions of Florida, Maine (semitrailers only) and Delaware. Businesses incorporated in Florida and Delaware may register their vehicles in those states through a local agent without complying with the other restrictive criteria discussed above. The extent to which these Florida and Delaware registrations are granted reciprocity, however, is limited by the terms of the reciprocity agreements.

25. Interstate motor carriers cannot register their vehicles in one state and operationally base their vehicles in another state since the state in which the vehicles are operationally based will refuse to recognize the registration under their reciprocity provisions. Pennsylvania has recently strengthened its laws in this area through amendments in 1983 (P.L. 122) and 1984 (Act 30) to Section 1301 of its Vehicle Code.

26. To coin Respondents' word, carriers can only "shop" for registration where they have an established place of business, or in the case of Florida and Delaware, if they are incorporated in one of those states.

27. Respondents are incorrect in stating that "[t]he steady, long-term trend has been toward larger national carriers which operate in many states." Stowers affidavit, paragraph 8. The long-term trend has been towards smaller carriers on the average. The number of

regulated interstate property carriers, for example, has increased 82% from 15,144 in 1973 to 27,517 carriers authorized in 1983 according to the annual reports of the Interstate Commerce Commission while the population of vehicles used by these carriers and their average revenues have not experienced comparable growth. The vast majority of these carriers have little, if any, choice in where their vehicles are registered.

28. Paragraph 3 of the Stowers affidavit also is incorrect in stating that anyone can register vehicles under the International Registration Plan subject only to the conditions and exceptions identified in Appendix S-1. That appendix explains the definition of "apportionable vehicle" defined in ARTICLE II.C of the IRP, but completely ignores the constraints on registration as set forth in paragraph 23 above. The same errors are made in paragraphs 3.b and 5 of the Stowers affidavit regarding registration in the reciprocity states, and in paragraph 3.c which suggests that any carrier can register a vehicle in Pennsylvania regardless of its actual base of operations. While Petitioners concede that Pennsylvania technically might issue such a registration to a carrier, that registration would not allow operation of the vehicle in the carrier's actual base state of operation or in most of the states with which Pennsylvania has reciprocity agreements.

29. Mr. Stowers' affidavit is again incorrect in relying upon Exhibit S-2 purportedly to demonstrate the carriers' alleged ability to shift their state of registration by showing an excessive abundance of truck registrations in states allegedly having low registration fees. Exhibit S-2 compares 1984 registration fees with 1980 population numbers and 1980 truck tractor registration numbers. Between 1980 and 1984, however, registration fees were changed in four of the listed states. In addition, the Respondents' conclusion rests upon the assumption that truck tractor registrations parallel population changes,

and yet truck tractor registrations according to their source (Table MV-9, *Highway Statistics*) have fallen in the last three years for which data is available, and have yet to regain the truck tractor population size in the United States in 1976. Truck population and the level of trucking activity, is a function of industrial activity in the United States, and has never varied directly with population changes.

30. Also incorrect is Respondents' position that carriers select states for registration based solely upon level of registration fees. *See, e.g.*, Exhibit R-5 of the Reno affidavit which compares only the registration fees of 20 states. For those few carriers that have places of business in more than one state and, therefore, have some flexibility in registration, the economic focus is on: (a) registration costs; (b) ad valorem property tax costs; and (c) availability of reciprocity. Of the 20 states listed in Exhibit R-5, 12 states impose an ad valorem property tax on vehicles ranging from a low of $450.17 (West Virginia) to a high of $3,852.00 (Rhode Island) and averaging $1,097.83. For the 20 state group in Exhibit R-5, the average 78,000 pound registration fee plus property tax cost is actually $1,347.30, considerably higher than the Pennsylvania cost of $936.00.

31. An example of the legal restraints upon registration is pointed out by Respondents themselves as paragraph 6 of the affidavit of Ms. Oberman states: "Pennsylvania requires by law that motor carriers which have their principal place of business in the Commonwealth register their locally-based fleet in Pennsylvania. See 75 Pa. C.S. § 1303(c)." Also, Mr. Reno states that states require carriers with vehicles "based in their state to register and pay a fee for registration." *See* Reno affidavit, paragraph 3, and the first paragraph of Appendix R-2, page R-3.

PENNSYLVANIA'S REGISTRATION FEES ARE NOT AMONG THE HIGHEST AND THERE ARE OTHER SUBSTANTIAL CAUSES OF THE DECLINE OF VEHICLE REGISTRATIONS IN PENNSYLVANIA AND OTHER STATES

32. Respondents assert that: (a) Pennsylvania's registration fees were among the highest in the country; and (b) that Pennsylvania lost registrations to other states when it increased fees in 1980.

33. Respondents' assertions above, and the more detailed "facts" upon which they are based are untrue.

34. Respondents' initial factual premise regarding the level of Pennsylvania's registration fees as compared to other states is incorrect in that:

(a) the highest registration fee states are Arizona, Illinois, Iowa, Kansas and Wisconsin;

(b) Pennsylvania registration fees were not higher than the fees of all six bordering states as of July, 1984. Furthermore, the listing in Exhibit R-3 of the Reno affidavit for New Jersey fees is incorrect and for New York it is incomplete and inaccurate because it does not take into account the higher vehicle registration fees of household goods carriers; and

(c) Respondents incorrectly rely upon Exhibit "A" of the Gross affidavit, allegedly comparing Pennsylvania's 1981 registration fees to such fees in the other 49 states and the District of Columbia for truck-tractors in 80,000 pound combinations. The Exhibit, however, is grossly misleading. It was admittedly put together from four different sources including "telephone calls," and there are 22 footnotes creating a total of 45 "exceptions" to the 51 registration fees listed in the Exhibit. More specifically, the Exhibit has the following blatant errors:

(i) the fees shown for the following eight states are incorrect: Arizona, California, Colorado, Hawaii, Illinois, Montana, Vermont, and Wyoming;

(ii) footnote 1 should not be identified with Arkansas and Pennsylvania;

(iii) footnotes 2, 10, 13 and 22 identify fees in four states that were increased in 1981 and, on the table, the lower fee is shown. Because Pennsylvania also increased its fees in 1981 and the increased Pennsylvania fee is shown on this table, consistency in the Exhibit demands that the fees shown for Wisconsin be $1,700, for North Carolina be $920, for Mississippi be $1,368 and for Idaho be $120;

(iv) footnote 4 should likewise be shown for Arizona, California, Colorado, Montana, Washington, and Wyoming;

(v) footnote 6 identifies the jurisdictions registering on an unladen weight basis but ignores the trailer registration cost which is substantial in all those jurisdictions;

(vi) footnote 7 should also be identified with Arizona, California, Montana, Nebraska, Nevada, Utah, Washington, and Wyoming; and

(vii) footnote 17 should be identified with Alaska, California, District of Columbia, Nevada, Ohio, and Wyoming.

Exhibits A also omits relevant facts in misleadingly attempting to show the Pennsylvania fee at the highest amount and other states at the lowest amount. For example: (a) in six states (see footnotes 9, 11, 13, 16, 19 and 20) different fees are charged to private and for-hire carriers, but the exhibit displays the lower of these fees in all six cases; and (b) property-type taxes collected as an element of vehicle registration are found in nine states, but that component is listed for only four states.

Furthermore, as Mr. Reno states on page R-14 of his affidavit, "Property taxes are assessed on vehicles in twenty-seven states, although not in Pennsylvania." These property taxes are, of course, to be considered by those few carriers that have options as to where to register.

35. Mr. Stowers also is incorrect in paragraph 11 of his affidavit in which he comments on Pennsylvania's registration fee increases in 1976 and 1980, proudly noting that "these fee changes were distributed to all in-state and out-of-state IRP carriers on an equal basis" under the IRP. Mr. Stowers apparently does not know that Pennsylvania only became a member of the International Registration Plan on September 15, 1982.

36. Mr. Reno's affidavit is incorrect and grossly misleading in stating, based upon Exhibit R-6 thereto, that from 1978 to 1982 Pennsylvania lost truck registrations to the six surrounding states, in that: a) although the registration numbers in the Exhibit were obtained from *Highway Statistics*, an annual publication of the Federal Highway Administration ("FHWA"), Mr. Reno failed to report in his affidavit that for 1981, the year in which a decrease in Pennsylvania registrations is shown, the FHWA made the following relevant observation:

> The figures in this column may vary substantially from the numbers shown for prior years. This results from new information and updating of the estimating procedures, and *is not because of substantial vehicle registration changes during 1981*;

(emphasis added); b) even if the Exhibit were accurate, it depicts five of the six surrounding states also as losing significant numbers of truck registrations during the same period; and, while Pennsylvania's share went from 24.97% to 21.94%, Ohio's portion went from 37.51% to 32.38%; and c) if there were actual losses in registrations; these losses might be attributed to loss of business

among carriers, cutbacks, carriers' going out-of-business, the general declining state of the economy, consequences of deregulation of the industry, shippers changing to other methods of transportation or a mix of these various factors.

RESPONDENTS' ALLEGATION THAT FOREIGN-REGISTERED VEHICLES DO NOT CARRY A FAIR SHARE OF THE TAX BURDEN IS UNTRUE AND ACT 234 IMPOSES AN ADDITIONAL FINANCIAL BURDEN ONLY UPON INTERSTATE COMMERCE

37. The assertion running through Respondents' brief and affidavits (*see*, e.g., brief at 9; Reno affidavit, paragraph 6) that foreign-registered vehicles, especially vehicles operated in Pennsylvania under registration reciprocity, pay less than their fair share and somehow get a "free ride" on Pennsylvania roads is untrue.

38. These foreign-registered vehicles do pay 100% registration fees to the states in which they are registered for which they receive (a) the privilege of travel in their states of registration and (b) the privilege of interstate travel in the reciprocating states.

39. That registration fee payment is not unlike the 100% registration fee payment Pennsylvania-based carriers make to Pennsylvania for which they receive (a) the privilege of travel in their state of registration, *i.e.*, Pennsylvania, and (b) the privilege of interstate travel in the states with which Pennsylvania has reciprocity agreements. By concurrently instituting the Axle Tax and lowering Pennsylvania vehicle registration fees, Act 234 imposes an additional financial burden *only* upon interstate commerce.

40. A vehicle base-registered in an IRP jurisdiction pays a proportionate registration fee to all IRP jurisdictions in which it travels. Hence, a foreign-registered ve-

hicle which is registered in an IRP jurisdiction other than Pennsylvania, may travel a substantial number of its miles in Pennsylvania, entitling Pennsylvania to a large, proportional registration fee. Conversely, a vehicle base-registered in Pennsylvania, will pay only a small percentage of the Pennsylvania registration fee if it travels a substantial number of miles in other IRP jurisdictions. (with the exception noted in paragraph 41, below).

41. The allegation on page R-7, reiterated on page R-19, of the Reno affidavit—that "[i]n most IRP states including Pennsylvania, the base state registration fee is applied to that portion of the mileage accumulated in non-IRP states"—is misleading in that such mileage is accrued to the base jurisdiction *only* if reciprocity is in effect. This is clearly stated in Article II.L of the IRP as follows:

> L. "In-Jurisdiction Miles" means the total number of miles operated by a fleet of proportionally registered vehicles in a jurisdiction during the preceding year. In those cases where the registrant operated a fleet of proportionally registered vehicles in jurisdictions that require no apportionment *and grant reciprocity*, the base jurisdiction may add such miles to the in-jurisdiction miles.

(emphasis added).

42. In addition to being required to pay registration fees to the state(s) in which they register their vehicles, carriers pay various taxes and user fees to the various jurisdictions in which their vehicles travel. In Pennsylvania, in addition to the Axle Tax, foreign-registered vehicles are subject to, among other things: (a) special hauling permit fees; (b) the Fuel Use Tax; (c) the Motor Carriers' Road Tax; (d) the Oil Company Franchise Tax; (e) the Gross Receipts Tax; and (f) the Liquid Fuel Tax. *See* Exhibit "B" to Respondents' brief,

paragraph 64. The Axle Tax represents an additional financial burden which impacts upon interstate commerce *only*.

43. Although the vast majority of states imposing a gross receipts tax do so only on intrastate activity, Pennsylvania imposes the tax on both intrastate and interstate activity. Hence, the allegation on page R-14 of the Reno affidavit, stating that "[o]ther taxes such as gross receipts taxes on for-hire carriers are levied in sixteen states, including Pennsylvania," is misleading because it ignores the fact that in 14 of the 16 states the gross receipts tax is imposed only on *intrastate* activity. The remaining two states are New York and Pennsylvania. In New York, the tax is payable in exchange for an exemption from net income tax for transportation corporations.

44. Contrary to the lower numbers consistently stated by Mr. Reno (see Reno affidavit, paragraph 7 and pages R-9 and R-10), Pennsylvania and *45* (not 39) other states collect fuel usage taxes. Similarly uninformed are the Reno affidavit statements on pages R-9 and R-10 that Florida, Rhode Island, Idaho and Ohio do not have fuel use reporting laws. In each case the exact opposite is true. Additionally, Ohio never "substituted" an axle mile tax for its fuel tax.

45. In juxtaposing "registration fees" with Pennsylvania's "fuel usage tax," paragraph 19 of the Reno affidavit is misleading by making it seem as if fuel usage tax is tied to registration fees. The second sentence of paragraph 19 states, "a truck which pays less in registration fees for the same travel in Pennsylvania also pays less in total fees (registration plus fuel taxes) for the same travel in Pennsylvania." While a truck which pays less in registration fees for the same travel in Pennsylvania may pay less in total fees, i.e., Respondents' idea of total fees—registration fees plus fuel tax—this lesser total amount exists *only* because of the payment of less

in registration fees and only because of the reciprocity on registration fees freely negotiated by Pennsylvania with other states. It has nothing to do with fuel usage tax which is the same for similar trucks traveling the same number of miles in Pennsylvania regardless of where the trucks are registered.

46. Fuel usage tax paid by foreign-registered vehicles is based upon gallons of fuel consumed in Pennsylvania just as it is for Pennsylvania-registered vehicles. Fuel usage tax has nothing to do with registration fees which are: 1) paid to Pennsylvania on behalf of Pennsylvania-registered vehicles traveling intrastate or traveling interstate to jurisdictions with which Pennsylvania has reciprocity agreements; 2) paid to jurisdictions other than Pennsylvania on behalf of foreign-registered vehicles registered in jurisdictions with which Pennsylvania has reciprocity agreements; 3) paid proportionally to Pennsylvania and other IRP jurisdictions on behalf of vehicles base-registered in Pennsylvania, traveling in state and in other IRP jurisdictions; and 4) paid proportionally to Pennsylvania and other IRP jurisdictions on behalf of vehicles base-registered in IRP jurisdictions other than Pennsylvania.

47. Although some states "collect usage fees based upon a carrier's miles of travel within the state and the weight of the vehicle(s) doing the travel," as stated in paragraph 9 of the Reno affidavit and discussed again in the first paragraph on page R-12 and in Exhibit R-2 of the Reno affidavit, almost all of these taxes have substantial exemptions, *e.g.*, New York's exemption of household goods carriers, Kentucky's exemption of coal haulers and Colorado's exemption of farm trucks. These taxes are paid for the actual distance traveled within the states, as admitted by Respondents, while the Axle Tax is not (except for vehicles traveling less than 2,000 miles).

48. Furthermore, although these taxes or "usage fees" collected by other states "are collected from all carriers no matter where registered," (with the exception of exemptions such as those noted in paragraph 47), it is not true that this fact makes them in any way "like Pennsylvania's axle tax." Reno affidavit, paragraph 9. The Axle Tax has practically no financial effect upon non-apportioned Pennsylvania-registered vehicles due to the reduction in registration fees for those vehicles in amounts substantially equal to the amount of the Axle Tax paid. If the Axle Tax legislation (Act 234) can be said to grant any exemption, it would be an exemption to intrastate Pennsylvania vehicles, by virtue of the registration fee reductions of Act 234.

49. It is not true as stated in paragraph 12 of the Reno affidavit that "[a]ll IRP registered trucks which travel in Pennsylvania pay the Pennsylvania axle tax on an equal basis, whether registered in Pennsylvania or in other IRP member states." *See*, also, the last three lines of page R-19 and the first two lines of R-20 where this allegation is reiterated in similar terms. On the contrary, an 80,000 pound, 5-axle, IRP truck, traveling 20,000 miles in Pennsylvania pays an Axle Tax of $180.00 which calculates to $.009 per mile. The same size IRP truck with the same number of axles traveling 2,000 miles in Pennsylvania pays an Axle Tax of $180.00 or $.09 per mile.

50. In 1982, I conducted a study of interstate motor carrier travel in Pennsylvania embracing 188,978 trucks (exceeding 17,000 lbs. gross vehicle weight) operated by 6,854 interstate motor carriers which traveled over 13 billion miles everywhere including more than 1 billion miles in Pennsylvania. The average Pennsylvania-based interstate truck traveled 5.2 times more miles in Pennsylvania than the non-Pennsylvania-based interstate trucks. Of the 953 Pennsylvania-based carriers in the study, 46.3% (442/953) average over 20,000 Pennsyl-

vania miles of travel per truck while only 2.7% (161/5901) of the non-Pennsylvania-based carriers exceeded 20,000 Pennsylvania miles per truck. On the other hand, of the 953 Pennsylvania-based carriers, only 4.0% (36/953) traveled under 2,000 miles per truck in Pennsylvania contrasted with 49.5% (2,921/5,901) of the non-Pennsylvania-based carriers. If purely intrastate carriers were added to the sample, the contrast would be even more pronounced when compared to non-Pennsylvania-based trucks. The example vehicles cited above are typical of the trucks actually traveling in Pennsylvania today.

51. With regard to the statement on page R-12 of the Reno affidavit—that "Pennsylvania's axle tax is prorated by mileage (up to 2,000 miles) like weight-distance taxes"—in actuality, unlike any of the usage or third structure taxes of other states as enumerated in the Reno affidavit, the full 100% maximum Axle Tax is paid to Pennsylvania *prior* to actual use for the privilege of future use. Proration does not occur until months after the close of the "usage year," most commonly at least 15 to 18 months after the tax was paid, and only after completion of a complex administrative procedure requiring extensive record keeping and multiple filings with the state agency. Many carriers have had their proration applications, and, therefore, their rebates, refused due to technical non-compliance with these complex procedures.

52. The Axle Tax is prorated by mileage only up to, but not including, 2,000 miles. Thus, a truck traveling 2,000 miles in Pennsylvania pays as much in Axle Tax as a truck traveling ten, twenty, thirty or more miles as much in Pennsylvania.

53. Average Axle Tax cost per mile calculations are influenced by the following two variable factors only:

(a) number of axles, and

(b) miles of Pennsylvania travel.

The "example" states listed on pages R-12 of the Reno affidavit are all contiguous to Pennsylvania which, based upon truck usage, will diminish the "average" Axle Tax cost per mile because of both factors. The average vehicle population traveling in Pennsylvania from these states will include a higher proportional segment of vehicles with two and three axles than the foreign-based vehicle population generally, thereby reducing the "average" Axle Tax cost, and these vehicles will travel more Pennsylvania miles than vehicles from more distant states. If the average costs for all vehicles from all states were shown in this affidavit, I am confident that, because of the two factors identified above, the lowest average cost per mile would be found for Pennsylvania-based trucks (under 0.5¢/mile) and the average cost would increase to almost 9¢ per mile for vehicles from the most distant states as these would be almost always vehicles with 5 or more axles and have low Pennsylvania mileage.

HEAVY TRUCK TRAFFIC IS NOT THE ONLY SUBSTANTIAL CAUSE OF BRIDGE DETERIORATION AND, IN ANY EVENT, BRIDGE DETERIORATION IS NOT MORE ATTRIBUTABLE TO FOREIGN-REGISTERED HEAVY TRUCKS THAN TO PENNSYLVANIA-REGISTERED HEAVY TRUCKS

54. The affidavits taken on behalf of Respondents by Walker P. Kilareski, Stephen R. Simco and John W. Fisher are concerned with the subject matter of road and bridge deterioration.

55. The main cause of road and bridge deterioration is not, as respondents say, heavy truck traffic. Indeed, one of the affiants on this issue, Mr. Kilareski, testified at the hearing relating to the marker decal fee in *American Trucking Associations, Inc. v. Bloom*, No. 315 C.D. 1982 (Pa. Commw. Oct. 17, 1983), at which I was present, that major causes of road and bridge deterioration

are chemicals, temperature, weather, moisture intrusion and environmental factors in general. N.T. 160-164. An additional Commonwealth witness, Barry A. Falkenstine, agreed with Mr. Kilareski's testimony. N.T. 170. In addition, deterioration also results from inadequate road and bridge design in the first place. N.T. 158, 159, 162-63, 168. The Notes of Testimony cited are attached hereto as Exhibit B.

56. Respondents' affiant and expert, Walter P. Kilareski, has written several articles and other published material on the subject of road and bridge deterioration. He has stated:

> Today's highway and bridge engineers are faced with a voluminous number of bridge decks that are deteriorating at an accelerated rate. Bridge decks that are expected to perform adequately for 30 years or more have shown signs of extensive deterioration after 5 years of service. Recent studies indicate highway departments alone pay over 70 million dollars a year for the repair of bridge decks, and this expenditure is swelling at a rapid pace.
>
> *Premature deterioration, in most cases, can be attributed to the corrosion of bridge deck reinforcing steel.* The corrosion process is an electro-chemical mechanism by which a metal is reduced to its natural ore. *The increased use of deicing materials that has taken place in the past decade is usually blamed for this condition.* Sodium and calcium chlorides, in particular, enter into solution with the moisture present on bridge decks. This solution permeates the concrete deck and forms an electrolyte which is a necessary component for corrosion. As the reinforcement steel corrodes, the red rust expands in volume. This expansion in volume exerts internal forces on the concrete. When the tensile strength of the concrete is exceeded, cracking and spalling result.

Kilareski, W.P., "Epoxy Coatings for Corrosion Protection of Reinforcement Steel," *Chloride Corrosion of Steel in Concrete*, ASTM STP 629, D.E. Tonini and S.W. Dean, Jr., eds., American Society for Testing and Materials, 1977, pp. 82-88, 82-83 (emphasis added).

57. It is well-known that major causes of road and bridge deterioration are chemicals, various environmental factors and inadequate design and construction. The affidavit of Richard A. Lill, Highway Engineer and Assistant Director, Economics and Taxation Department, American Trucking Associations, Inc., explains why Respondents are incorrect in contending that heavy trucks are primarily responsible for road and bridge deterioration based on interpretations of the AASHO road tests.

58. There is no evidence that foreign-registered heavy vehicles cause more damage to roads and bridges than Pennsylvania-registered heavy vehicles. Indeed, at the hearing relating to the marker decal fee, the Commonwealth's own witnesses, Messrs. Kilareski and Falkenstine, established that a foreign-registered vehicle burdens the roads of Pennsylvania in exactly the same manner and amount as a Pennsylvaia-registered vehicle of similar size and weight. N.T. 167, 177, attached hereto as part of Exhibit B. Foreign-registered trucks are not generally heavier than Pennsylvania-registered trucks; Pennsylvania-based vehicles need only comply with the very liberal Pennsylvania axle weight limits and interstate vehicles must comply with the lower axle weight limits imposed by most of the other states through which they travel. Axle weight, of course, is one of the principal concerns of highway engineers in the design, construction and maintenance of highway pavements (see affidavit of Richard A. Lill).

59. Additionally, Pennsylvania-registered vehicles use Pennsylvania roads and bridges more than foreign-

registered vehicles—accounting for approximately 65% of the total miles traveled by all vehicles over 26,000 lbs. GVW on the roads of the Commonwealth in 1979 (the latest available figures of the Department of Transportation as of June, 1983). *See* Petitioners' Exhibit 1 to the Transcript of Proceedings of June 16 and 17, 1983 in *American Trucking Associations, Inc. v. Bloom*, No. 315 C.D. 1982 (Pa. Commw. Oct. 17, 1983), attached hereto as Exhibit C.

60. Hence, paragraph 15 of Mr. Stowers' affidavit is incorrect in placing a high degree of the blame for "damage to Pennsylvania highways and bridges" upon the out-of-state motor carriers because of their substantial use of Pennsylvania highways and because, on average, they "operate heavier equipment in Pennsylvaia than Pennsylvania based carriers."

61. Respondents are incorrect in stating that "[t]he vast majority of heavy vehicles registered in Pennsylvania travel a substantial portion of their mileage outside of Pennsylvania" (Stowers affidavit, paragraph 13) and that "large combination trucks do most of their travel outside their base states." Reno affidavit, page R-26. The *Truck Inventory & Use Survey*, extensively cited by Respondents, is a component study within the *Census of Transportation* conducted periodically by the U.S. Department of Commerce. The survey shows that many large and heavy trucks are substantially local in nature. The most recent data (1977) for heavy trucks (*i.e.*, over 26,000 lbs. GVW) registered in Pennsylvania shows that 62% of those Pennsylvania trucks accrue between 75% and 100% of their miles in Pennsylvania and an additional 16% of those trucks accrue at least half of their miles in Pennsylvania. The data also shows that nationally, of the 1,432,300 trucks exceeding 26,000 lbs. GVW (includes 95% of all combination trucks), 1,002,300 trucks (70%) accumulated at least 75% of their miles in their base states. The survey further reveals that, of

these 1,432,000 trucks, 756,100 trucks (53%) were classified as local service vehicles defined as: "Mostly in the local area, i.e., in or around the city and suburbs, or within a short distance of the farm, factory, mine or other place where the vehicle is stationed."

62. The Reno affidavit similarly is misleading in representing that Pennsylvania-registered vehicles traveled 651,956,107 miles in Pennsylvania. *See* page R-10 and Exhibit R-1 thereof. Respondents themselves admit that figure does not include vehicles which travel 90 percent or more of their mileage in the Commonwealth. *See* Reno affidavit, page R-10, footnote 1. If Respondents had included the Pennsylvania mileage for Pennsylvania-registered vehicles traveling 90% or more of their miles within Pennsylvania that mileage figure would increase the total miles traveled in Pennsylvania by Pennsylvania-registered vehicles by more than one and one-half billion miles. See Exhibit C hereto. Even the SYDEC group, upon which Respondents so heavily rely, recognizes this shortcoming by estimating an additional 935,000,000 miles operated in Pennsylvania by Pennsylvaia-based carriers which experience at least 90% of their mileage in Pennsylvania. *See* Exhibit S-4 to the Stowers affidavit where this mileage is added to the mileage reported in Exhibit R-1 to the Reno affidavit. Even by their own estimate, over 50% of the truck travel in Pennsylvania is by Pennsylvania-based and registered trucks. Their estimate, however, is low when compared to the data on which the Pennsylvania Department of Transportation relies in conducting its highway planning (see Exhibit C).

63. Further, it is confusing and misleading to state that "36 percent of travel by tractor-semitrailer trucks in Pennsylvania was on the Interstate System, while 64 percent was on the principal arterial, collector, and local roads." *See* Reno affidavit paragraph 20 and page R-28 under Appendix R-5. There is no reference in what the

Respondents say regarding which trucks are traveling on which roads; *i.e.*, there is no distinction between Pennsylvania-registered trucks' travel and the travel of foreign-registered trucks; between intrastate truck travel or trucks that travel most of their miles within Pennsylvania and travel done by interstate vehicles, except for a misleading, inaccurate, unsubstantiated and intentionally confusing statement that "the majority of [the] mileage [accrued in Pennsylvania by combination trucks of over 40,000 pounds] is devoted to interstate travel." Reno affidavit, page R-26. If Respondents mean that most of the Pennsylvania miles accrued on the non-interstate roads was accrued by vehicles other than trucks engaged in intrastate travel, they are incorrect and there is no evidence to support that allegation. If they mean that most of the Pennsylvania miles accrued on the non-interstate roads was accrued by vehicles traveling both in and out of Pennsylvania, they are incorrect and ignore the facts that: a) Pennsylvania-registered vehicles which travel 90% or more of their miles within Pennsylvania account for an enormous number of Pennsylvania miles; and b) Pennsylvania-registered vehicles used the roads of the Commonwealth more than foreign-registered vehicles—accounting for approximately 65% of the total miles traveled by all vehicles on the roads of Pennsylvania in 1979. If, however, Respondents mean that most of the trucks which travel in Pennsylvania accrue most of their miles outside of Pennsylvania, Petitioners agree.

64. Respondents' statements that a) all reciprocity states on Exhibit R-1 travel 900 million miles in Pennsylvania and b) all other IRP states on Exhibit R-1 travel 500 million miles in Pennsylvania are inapposite. First, Pennsylvania- registered vehicles themselves travel millions of miles in states with which Pennsylvania has reciprocity agreements similiarily without paying registration fees to those states. Second, the 900 million miles, even if accurate, pales before the more than two

billion miles traveled in Pennsylvania by Pennsylvania-registered vehicles. See paragraph 62. Third, because of the proportional registration aspect of the IRP, the figure of "500 million vehicle miles" has no meaning in this context because Pennsylvania *does* receive proportioned registration fees for that total mileage whether the vehicles traveling those miles are base-registered in Pennsylvania or in anothr IRP jurisdiction.

/s/ Douglas A. Hughes
DOUGLAS A. HUGHES

Washington, D.C.
Sworn to and subscribed
before me this 15th day
of November, 1984

/s/ Joseph L. Johnson
NOTARY PUBLIC

My commission expires:
My Commission Expires April 30, 1985

REGISTRATION FEE CHANGES, 1980-83

Class	Registered Gross or Combination Weight in Pounds	Act 1980-68 Changes ($) 1/ Old	New	Amount Increase ($)	Act 1982-234 Changes ($) 2/		Amount of Decrease ($)	Overall Change (Pre Act 1980-68 to past Act 1982-234) ($)
1	5,000 or less	39		None	$ 39		None	None
2	5,001-7,000	[52]	54	2	54		None	+2
3	7,001-9,000	[84]	102	18	102		None	+18
4	9,001-11,000	[108]	132	24	132		None	+24
5	11,001-14,000	[132]	162	30	162		None	+30
6	14,001-17,000	[156]	192	36	192		None	+36
7	17,000-21,000	[192]	237	45	237		None	+45
8	21,001-26,000	[216]	270	54	270		None	+54
9	26,001-30,000	[252]	315	63	[315]	243	72	-9
10	30,001-33,000	[300]	378	78	[378]	306	72	+6
11	33,001-36,000	[324]	414	90	[414]	342	72	+18
12	36,001-40,000	[342]	438	96	[438]	366	72	+24
13	40,001-44,000	[360]	465	105	[465]	357	108	-3
14	44,001-48,000	[384]	501	117	[501]	393	108	+9
15	48,001-52,000	[420]	552	132	[552]	444	108	+24
16	52,001-56,000	[444]	588	144	[588]	480	108	+36
17	56,001-60,000	[501]	666	165	[666]	558	108	+57
18	60,001-64,000	[552]	741	189	[741]	597	144	+45
19	64,001-68,000	[576]	777	201	[777]	633	144	+57
20	68,001-73,280	[606]	834	228	[834]	690	144	+84
21	73,281-76,000		1065	[ ]	[1065]	885	180	[ ]
22	76,001-78,000		1089	N/A	[1089]	909	180	N/A
23	78,001-78,500		1101	Newly Created	[1101]	921	180	Newly Created
24	78,501-79,000		1113	Weight Classes	[1113]	933	180	Weight Classes
25	79,001-80,000		1125	[ ]	[1125]	945	180	[ ]

1/ Source: Act 1980-68, § 2, effective August 17, 1980.

2/ Source: Act 1982-234, § 1, effective April 1, 1983.

EXHIBIT "A"

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

May 1, 1984

LeRoy S. Zimmerman
ATTORNEY GENERAL

Reply To:

15th Fl., Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

Arthur R. Littleton, Esquire
Morgan, Lewis & Bockius
2000 One Logan Square
Philadelphia, PA 19103

Re: Axle Tax Matter

Dear Mr. Littleton:

In response to your letter of February 15, 1984, we provide the following information which you have requested (see paragraph 2 of that letter). Please note that some answers are estimates of limited accuracy and reliability. They cannot be used without reference to those limitations.

2a. *The total number of motor carrier vehicles for which the Axle Tax for Highway Bridge Improvement ("Axle Tax") of 75 Pa. C.S. § 9901, et seq., was paid in 1983.*

403,656. This answers assumes that "1983" refers to the 1983 axle tax year of April 1, 1983 to March 31, 1984. This number reflects axle tax payments made from January, 1983 to date.

2b. *A breakdown of the total number of motor carrier vehicles for which the Axle Tax was paid in 1983 by the*

number of axles for which the tax was paid (for example, two axles, three axles, four axles, etc.).

2 axles:	37,709
3 axles:	19,842
4 axles:	48,028
5 axles:	290,741
6 axles:	6,963
7 axles:	289
8 axles or more:	84
TOTAL:	403,656

2c. *The total number of all motor carriers which paid the Axle Tax for their motor carrier vehicles in 1983.*

No exact number can be computed, for the reasons described below:

The Vehicle Code defines a motor carrier as "every person who operates or causes to be operated any motor vehicle on any highway in this Commonwealth." 75 Pa. C.S. § 9901. Therefore, a registrant of a Pennsylvania vehicle who does not actually operate the vehicle would be considered a motor carrier because he "causes" the vehicle to be operated by his ownership.[1] For purposes of this response it is assumed that the Petitioner is concerned with the person who operates the vehicle, not the person who "causes" the operation.

Department of Transportation records pertain to individual vehicles and registrants. The registrant may or may not actually *operate* the vehicle. Accordingly, it

---

[1] Many trucking companies own and operate their own trucks. In other instances, lessors lease trucks to trucking companies. In the latter cases the lessor and lessee are both "motor carriers" as defined in the Vehicle Code: lessor "causes" the vehicle to be operated by his ownership and the lease, while the lessee actually "operates" the vehicle. Between the lessor and lessee, however, the axle tax on the truck is paid only once, at the time of registration.

is not possible to identify the motor carrier from Transportation records.

The Department of Revenue maintains motor carriers road tax accounts. A "motor carrier" is defined the same as in the Vehicle Code. Generally, the motor carrier maintaining the account is the *operating* carrier. While a single carrier could have more than one account, in general each carrier has only one account.

Two types of road tax accounts exist. First, *regular accounts* include carriers who regularly travel into other states. Carriers in this category file quarterly reports of fleet mileage everywhere and in Pennsylvania, total fuel used in all operations of the fleet, and fuel purchases in Pennsylvania. Second, *annual accounts* include carriers whose vehicles are registered in Pennsylvania, travel at least 90% of their mileage annually in Pennsylvania, and purchase sufficient fuel in Pennsylvania to cover that mileage.

Road tax accounts include all vehicles over 17,000 pounds registered gross weight. The axle tax data maintained by the Department of Revenue has been inserted into the existing road tax file structure by expanding the information in each file. Accordingly, a separate axle tax account by carrier does not exist. In order to identify the number of motor carriers who paid the axle tax in 1983, it is necessary to eliminate from the total number of road tax accounts the number of such accounts in which axle tax was not paid because the carrier had no vehicles over 26,000 pounds.

The total of the regular and annual accounts that indicate axle tax payments would fairly approximate the number of motor carriers paying axle tax.

Based upon data available as of March 28, 1984, the Revenue Department *estimates* that approximately 88% of regular accounts show an axle tax payment on at least one vehicle. (1983 data has already been removed from

the computer system which could perform the necessary analysis.) In 1983 there were 30,269 regular accounts. Accordingly, it is estimated that 26,637 motor carriers with regular accounts paid the axle tax in 1983, on at least one vehicle.

In 1983 there were 7,128 annual accounts. Due to the local nature of the business done by these accounts, as indicated by the limited extent of their range of operation, it is estimated that a large portion are smaller trucks under 26,001 pounds and not subject to the axle tax. No data is available even to estimate that portion. Thus, the best available estimate of the total number of motor carriers which paid the Axle Tax in 1983 is something over 26,637. Again, this refers to motor carriers which paid the axle tax for at least one vehicle.

2d. *The total number of motor carrier vehicles exceeding 26,000 pounds GVW which were registered in the Commonwealth of Pennsylvania and for which the Axle Tax was paid in 1983.*

83,118. This number includes apportioned registered vehicles.

2e. *A breakdown of the total number of Pennsylvania-registered motor carrier vehicles exceeding 26,000 pounds GVW which paid the Axle Tax for 1983 by the number of axles for which the tax was paid (for example, two axles, three axles, four axles, etc.)*

2 axles	20,039
3 axles:	10,702
4 axles:	19,181
5 axles:	31,927
6 axles:	1,100
7 axles:	137
8 axles or more:	32
TOTAL:	83,118

(This includes apportioned registered vehicles. See paragraph 2d above.)

2f. *The total number of motor carrier vehicles in excess of 26,000 pounds GVW which were registered in the Commonwealth of Pennsylvania in 1983.*

84,195. This includes apportioned-registered vehicles.

2g. *The total number of all motor carriers which registered motor carrier vehicles in excess of 26,000 pounds GVW within the Commonwealth in 1983.*

No number can be computed. As is explained in paragraph 2c above, Department of Transportation records pertain to individual vehicles and registrations. The registrant may or may not actually *operate* the vehicle. Accordingly, it is not possible to identify the motor carrier from Transportation records.

2h. *The number of motor carrier vehicles for which the Axle Tax was paid in 1983 which were registered in jurisdictions that are members of the International Registration Plan.*

No accurate answer can be provided.

The Department of Transportation has no information on the number of vehicles registered in other IRP jurisdictions.

The Department of Revenue does not record individual vehicle data and is unable to provide an accurate or reliable estimate. Based upon the mailing address of the motor carriers road tax accounts, as indicated in Revenue records, 126,466 axle tax markers were issued in 1983 to road tax accounts with a mailing address in an IRP jurisdiction. While the state indicated in the mailing address may be the state in which the vehicles (for which the axle tax markers were purchased) are registered, any number of the vehicles could actually be registered in other states. This method appears to have very low reliability.

2i. *The number of Pennsylvania-registered motor carrier vehicles in excess of 26,000 pounds GVW which did not apportion registration with any other jurisdiction in 1983.*

66,788.

If you have any questions concerning these matters, please feel free to contact me.

Very truly yours,

/s/ Maura A. Johnston
MAURA A. JOHNSTON
Deputy Attorney General

MAJ/esm

SUPREME COURT OF THE UNITED STATES

No. 86-357

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellants

v.

JAMES I. SCHEINER, Secretary,
Department of Revenue, *et al.*

APPEAL from the Supreme Court of Pennsylvania, Middle District.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

November 10, 1986

Supreme Court, U.S.
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No. 86-357

In the Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellants

v.

JAMES I. SCHEINER, SECRETARY OF THE DEPARTMENT OF REVENUE, *et al.*,
Appellees

On Appeal from the Supreme Court of Pennsylvania

BRIEF FOR THE APPELLANTS

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QUESTIONS PRESENTED

1. Whether Pennsylvania's axle tax statute discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution because, by simultaneously reducing registration fees for trucks registered in the State by amounts equal to the tax, Pennsylvania has caused the tax to be borne almost entirely by trucks registered outside the State.

2. Whether Pennsylvania's axle tax statute and its predecessor marker fee statute discriminate against interstate commerce in violation of the Commerce Clause of the United States Constitution because each imposes a substantially higher effective tax rate on trucks registered outside the State than on trucks registered in the State.

PARTIES TO THE PROCEEDING AND RULE 28.1 STATEMENT

Appellants are plaintiff classes consisting of all interstate motor carriers whose vehicles are registered outside of Pennsylvania and who were subject to the $25 identification marker fee requirement or who were, are, or will be subject to the axle tax, in addition to the following named plaintiffs:

Appellant American Trucking Associations, Inc. (ATA), is an independent corporation that has no subsidiaries or affiliates that are not wholly owned.

Appellant Astro Container Company, which has no subsidiaries or affiliates, is a division of Allied Drum Services, Inc.

Appellant Interstate Truck Leasing, Inc., which has no affiliates or subsidiaries, is a subsidiary of Fred Taylor Company, Inc.

Appellant Interstate Van Lines, Inc., is a subsidiary of I.V.L. Corp. Interstate Van Lines' affiliates or subsidiaries (other than wholly owned subsidiaries) are Ace Van & Storage Co., Inc.; A.E.M. Inc.; and Interstate International Inc.

Appellant Old Dominion Freight Line Inc. is an independent corporation whose subsidiaries and affiliates (other than wholly owned subsidiaries) are Old Dominion Tank Leasing, Inc.; E & J Enterprises; Deaton, Inc.; and Road-Runners Freight System.

Appellant Tri-State Motor Transit Co. is an independent corporation whose subsidiaries and affiliates (other than wholly owned subsidiaries) are Contract Operators Accounting Service; Aero Body & Truck Equipment, Inc.; LTL Leasing Co.; Loadus Truck Leasing, Inc.; H.G.O. Rigging & Storage Inc.; LKO Leasing Co.; Central States Transportation Co.; and J. H. Rose Truck Lines Co.

Appellant Anderson Trucking Services, Inc., is an independent corporation whose subsidiaries and affiliates (other than wholly owned subsidiaries) are St. Cloud Truck Sales; K & W Trucking Co., Inc.; H. E. Anderson Equipment Leasing; and R.B.J. Industries, Inc.

Appellees are the following defendant state officials, or their successors: James I. Scheiner, Secretary of the Department of Revenue of the Commonwealth of Pennsylvania; Leroy S. Zimmerman, Attorney General of the Commonwealth of Pennsylvania; and Nicholas G. Dellacipeste, Commissioner of the State Police of the Commonwealth of Pennsylvania.

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Appellees

On Appeal from the Supreme Court of Pennsylvania

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania (J.S. App. A) is reported at 509 A.2d 838. The opinions of the en banc Commonwealth Court (J.S. Apps. C, D, and E) are reported at 87 Pa. Commw. 345, 487 A.2d 468 (marker fee), 87 Pa. Commw. 379, 487 A.2d 465 (axle tax), and 87 Pa. Commw. 418, 489 A.2d 269 (marker fee refund), respectively. The opinion of the single Commonwealth Court judge in the marker fee case (J.S. App. F) is reported at 77 Pa. Commw. 575, 466 A.2d 755.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania (J.S. App. B) was entered on May 6, 1986. Notices of appeal to this Court (J.S. Apps. G, H, and I) were filed on June 16, 1986. On July 25, 1986, Justice Brennan

extended the time within which to docket the appeal to September 3, 1986, and the appeal was docketed on that date. The Court noted probable jurisdiction on November 10, 1986 (J.A. 267). The jurisdiction of this Court rests on 28 U.S.C. § 1257(2).

STATUTES INVOLVED

The relevant statutes are set forth at J.S. App. 80a-91a.

STATEMENT

Like all other states, Pennsylvania requires funds to finance the construction, maintenance, and repair of its roads, bridges, and tunnels. Also like other states, Pennsylvania raises the funds largely through taxes and fees levied on the users of its highways. A substantial proportion of these taxes is paid by interstate motor carriers. Appellant American Trucking Associations, Inc. ("ATA"), as their representative, has brought this suit not because of any objection to the raising of revenues by highway user charges or to the level of revenues Pennsylvania seeks to raise, but solely because the discriminatory nature of the two highway use taxes Pennsylvania has adopted—the marker fee and its successor, the axle tax—favors local interests at the expense of interstate commerce.

This discrimination takes two forms. The first, which relates solely to the axle tax, derives from the purposeful manipulation of Pennsylvania's highway tax system to impose almost the entire burden of the axle tax on vehicles registered in other states. This was accomplished by enacting a reduction in Pennsylvania truck registration fees simultaneously with and, in virtually all instances, identical in amount to the newly created axle tax.

The axle tax also suffers from an independent and equally fatal flaw, which infects the marker fee as well. Under both taxes, the payment a truck must make to

drive on Pennsylvania's highways is essentially a fixed amount that does not vary with the extent to which the truck actually uses those highways. As common sense suggests, and as the record in this case demonstrates, the average Pennsylvania-based truck travels many more miles on the State's highways than its otherwise identical counterparts registered in other states. Nevertheless, it pays no greater tax than out-of-state trucks, and therefore it is able to spread the same tax over many more miles of in-state operations. This gives the Pennsylvania truck a substantial economic advantage over out-of-state competitors.

The Supreme Court of Pennsylvania rejected both Commerce Clause challenges, relying on an analysis that, if accepted by this Court, would encourage the adoption of discriminatory state taxation that is burdensome to interstate commerce at best and potentially crippling at worst.

A. The Pennsylvania Tax Statutes.

Pennsylvania imposes a variety of taxes and fees on users of its highways, including uncontroversial ones such as vehicle registration fees and taxes on fuel purchased or used there. The revenues from Pennsylvania's highway taxes are placed in its Motor License Fund and expended for highway construction and maintenance or other road-related purposes (J.S. App. 2a-3a). The current controversy arises because of Pennsylvania's adoption, beginning in 1980, of new forms of highway use taxation that fall disproportionately upon out-of-state truckers—a discrimination compounded in the case of the axle tax by Pennsylvania's manipulation of its tax system to relieve its own truckers of virtually the entire cost of the tax.

1. *The Marker Fee.* In June 1980, Title 75 of Pennsylvania's Vehicle Code was amended to increase from $2 to $25 the identification marker fee that motor carrier vehicles (*i.e.*, trucks, truck tractors, or combinations)

registered outside Pennsylvania and weighing more than 17,000 pounds had to pay as a condition of operating on the State's highways. 75 Pa. Cons. Stat. Ann. § 2102 (Purdon 1981) (J.S. App. 80a-81a). Marker fee payments were required only for non-Pennsylvania-based trucks. For trucks registered in Pennsylvania, the fee was "deemed a part of and included in the vehicle registration fee." *Id.* at § 2102(b) (J.S. App. 6a).

The $25 marker fee was a tax for the privilege of using Pennsylvania's roads; the administrative cost associated with the issuance of the markers was stipulated to be approximately $5 per vehicle. See J.A. 21-22. The marker fee payments generated substantial revenues. For the 12 months beginning April 1, 1981, decals were purchased for nearly 400,000 non-Pennsylvania-based trucks at a cost of approximately $10 million (R. 267, 465).

2. *The Axle Tax.* By legislation (sometimes referred to as "Act 234") passed in December 1982 and effective April 1, 1983, the marker fee was reduced to $5 per year.[1] At the same time, however, Act 234 instituted a much larger impost—the axle tax, which remains in effect today. 75 Pa. Cons. Stat. Ann. § 9901 *et seq.* (J.S. App. 82a-86a). This tax, which applies to trucks weighing more than 26,000 pounds, requires an annual payment of $36 per axle. Trucks subject to the tax have between two and five axles and therefore pay an annual tax of from $72 to $180.[2] Before rebates, the axle tax raised approximately $80 million in fiscal year 1983-84, of which about $68 million was paid for trucks registered in states other than Pennsylvania (J.A. 207).

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[1] Because this amount was stipulated to reflect costs actually incurred in administering the marker (decal) system, appellants have not contested the lawfulness of the reduced fee.

[2] Vehicles traveling fewer than 2,000 miles a year in Pennsylvania may obtain a rebate of this tax proportionate to their reduced mileage (J.S. App. 83a-84a).

The stated purpose of the axle tax is "to provide for the creation of jobs and the rehiring of [Pennsylvania's] unemployed." 75 Pa. Cons. Stat. Ann. § 9907(b) (J.S. App. 84a). All axle tax proceeds are placed in a new Highway Bridge Improvement Restricted Account within the Motor License Fund. The law promotes Pennsylvania employment by requiring that firms with Pennsylvania-based facilities be "actively solicited to make bids on contracts to furnish products and materials" to be used in projects funded by the Account (*id.* at 84a-85a).

The axle tax on its face applies equally to Pennsylvania-based and non-Pennsylvania-based trucks. However, the same enactment that created the axle tax also provided for a simultaneous reduction in registration fees paid by Pennsylvania-based trucks subject to the axle tax. This reduction was in nearly all instances identical in amount to the axle tax. J.S. App. 9a, 30a, 40a n.1 (table); J.A. 260. The result of this manipulation is that the cost of the axle tax has been borne almost entirely by interstate truckers operating non-Pennsylvania-based vehicles on the State's highways, while Pennsylvania-based operators have been largely relieved of any financial burden despite their nominal obligation to pay the tax.[3]

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[3] Under the International Registration Plan ("IRP"), to which Pennsylvania and 34 other states belong, registration fees paid for a truck are apportioned among member states in accordance with the percentage of total miles driven by the truck in each state. Thus, if a truck registered in some other IRP state drove 10% of its total miles in Pennsylvania, it would pay 10% of Pennsylvania's registration fee. Conversely, a Pennsylvania-registered truck that drove 50% of its miles in other IRP states would pay appropriate proportions of those other states' registration fees, while paying Pennsylvania only 50% of its fee. The operation of the IRP is described briefly by the court below at J.S. App. 5a & n.2. For the reasons explained by the dissent (*id.* at 45a-46a), however, the fact that the IRP slightly reduces the impact of the registration fee reduction in the case of some affected taxpayers does not eliminate the discrimination or remove the Commerce Clause objections to it.

Even apart from the reduction in registration fees, the cost of the axle tax, like that of the marker fee that preceded it, falls disproportionately on out-of-state vehicles. Because these taxes are basically for a fixed amount, their per-mile cost declines with increased use of Pennsylvania's highways. And as the records in both the marker fee and the axle tax cases establish, the typical Pennsylvania-based vehicle drives many more miles on the State's highways than its non-Pennsylvania-based counterpart. For example, evidence introduced in the marker fee case, based principally on state tax records and responses to a survey conducted by appellant ATA, showed that in 1981 Pennsylvania-based trucks traveled an average of nearly 23,000 miles each on the State's roads, whereas foreign-based trucks averaged slightly over 4,500 miles apiece. J.A. 99, 101, 104. These data reflect an average per-mile tax cost for vehicles registered outside of Pennsylvania that is more than 5 times the cost for in-state vehicles. Equally striking was evidence showing that while Pennsylvania-registered trucks were responsible for between 45% and 65% of all miles driven on Pennsylvania's highways by trucks subject to the axle tax (compare J.A. 195 with J.A. 99, 101), their payments accounted for less than 16% of total axle tax revenues (J.A. 207).

B. The Proceedings Below.

The subject of this appeal is the judgment of the Supreme Court of Pennsylvania in consolidated cases that appellants originally brought in the Commonwealth Court.

1. *ATA I*, filed in February 1982, challenged the validity of the marker fee statute under the Commerce Clause of the United States Constitution. The statute was challenged for two reasons. First, because by its terms it applied only to trucks registered outside Pennsylvania, the marker fee was attacked as facially discriminatory. Second, because of its substantially disparate cost-per-mile impact on Pennsylvania-based and non-Pennsylvania-

based trucks arising from in-state vehicles' greater use of Pennsylvania roads, the marker fee was attacked as discriminatory in effect.

Following the certification of a plaintiff class consisting of non-Pennsylvania-based interstate motor carriers subject to the marker fee requirement (see J.S. App. 10a), the Commonwealth Court held the marker fee facially discriminatory and therefore unconstitutional under the Commerce Clause. The court based its ruling on the manner of adoption of the marker fee system, which impermissibly placed the entire burden of the tax on vehicles registered outside of Pennsylvania (*id.* at 70a-72a). In view of that holding, the court found it unnecessary to consider appellants' contention that the fee was unconstitutional because of its discriminatory cost-per-mile impact (*id.* at 73a). The en banc Commonwealth Court held the marker fee invalid on essentially the same ground (*id.* at 52a-57a).[4]

2. *ATA II* was a class action brought by appellants in the Commonwealth Court in January 1983, on the heels of the enactment of the axle tax and in advance of its effective date. On cross-motions for summary judgment, appellants prevailed before the en banc Commonwealth Court, which found the tax facially discriminatory against interstate commerce (J.S. App. 61a):

> Examining the Axle Tax in conjunction with the simultaneously enacted registration fee reductions, we conclude that the assessment facially discriminates against interstate commerce. The registration fee reductions almost always offset assessments, virtually insulating operators of locally but not foreign,

[4] A separate case ("*ATA III*") was brought in the Commonwealth Court and consolidated in the Pennsylvania Supreme Court with respect to marker fee refunds for the period prior to the suit in *ATA I*. See J.S. 8. It is part of the instant appeal, but presents no different federal issue and therefore requires no independent discussion.

> registered vehicles from the levy's financial impact. Since the Axle Tax discriminatorily affects the operators of foreign-registered vehicles, who bear the full brunt of the tax, the assessment constitutes economic protectionism and is facially invalid.

Again, because the court found that the tax discriminated on its face, it did not consider the challenge based on discriminatory effect (*id.* at 62a n.4).

3. The State appealed to the Supreme Court of Pennsylvania, which, in a split decision, reversed the lower court and upheld both the marker fee and the axle tax. J.S. App. A.

The court rejected the argument that the marker fee and the axle tax were discriminatory in operation because, not being proportioned to the extent of highway use, they imposed higher per-mile costs on trucks registered outside of Pennsylvania (which generally make substantially lesser use of its highways) than on those registered within it. The court viewed this contention as raising an objection under the "fourth facet" of the test set forth in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977), *i.e.*, whether the fee or tax is "fairly related" to the services provided by the State (J.S. App. 24a, 34a).[5] Because of the high costs of maintaining Pennsylvania's highways, the court found that the marker fee and axle tax were not excessive or manifestly disproportionate and therefore were "fairly related" to the highway construction and maintenance services provided by the State to out-of-state vehicles (*id.* at 29a). The court further asserted that any difference in the impact of the taxes on local and out-of-state truckers was "inconsequential to our Commerce Clause analysis" (*id.* at 28a (emphasis in original)):

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[5] The court noted (J.S. App. 25a n.15) that appellants also challenged the cost-per-mile effect of the taxes under the third prong of the *Complete Auto* test, which condemns state taxes that discriminate against interstate commerce.

> Interstate motor carriers are free to use the Commonwealth's highways as often and for whatever distances they wish and cannot be heard to complain that, because they choose to use those highways less frequently than motor carriers whose vehicles are registered in Pennsylvania *may* use them, the burden of the flat fee falls too heavily upon them.

In addition, with respect to the axle tax, the court acknowledged the simultaneous reduction of registration fees that accompanied enactment of the tax and characterized appellants' discrimination argument as "[a]t first blush . . . appealing" (J.S. App. 31a). Nevertheless, it agreed with the State that the arrangement under which the burden of the tax fell almost entirely on out-of-state truckers was defensible as a "rational restructuring" of tax obligations (*ibid.*). The court stated that it "need go no further" (*id.* at 32a) than a comparison of the axle tax to the much higher registration fees, which it believed demonstrated that vehicles registered in Pennsylvania still were required to pay more for the privilege of using the State's highways than were their non-Pennsylvania counterparts (*id.* at 33a):

> [C]onsidered in conjunction with all other provisions of Pennsylvania's highway user fee system, [the axle tax] works no discrimination against interstate commerce in practical operation. It is entirely proper for a state to enact a compensatory tax to neutralize or partially offset an economic advantage previously enjoyed by interstate commerce to the disadvantage of local commerce that was caused by operation of that state's taxing scheme.

The court added that any discriminatory or protectionist motive the legislature may have held was immaterial if the tax was otherwise lawful (*id.* at 34a-35a).[6]

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[6] The court also rejected (J.S. App. 22a-24a) on state law grounds the additional argument that the marker fee was not paid at all by Pennsylvania-registered trucks and was therefore facially discriminatory. That holding is not involved in this appeal.

Two justices dissented with respect to the constitutionality of the axle tax. In an opinion by Chief Justice Nix, they concluded that the axle tax violated the Commerce Clause because its burden fell almost entirely on non-Pennsylvania-based truckers. The dissent first noted (J.S. App. 39a) that it is "incumbent upon the reviewing court to determine whether the challenged statute, in practical operation, works discrimination against interstate commerce in purpose or effect." Applying that test, the dissent concluded (*id.* at 41a) that the offsetting reductions in registration fees that accompanied adoption of the axle tax gave the tax an "unequal financial impact" that facially discriminated against interstate commerce. The dissent further observed (*ibid.*) that "there is nothing in the statute itself or in the circumstances surrounding [its] enactment" to support the court's conclusion that the statute was intended to effect a "rational restructuring" of tax burdens; instead, the expressed purpose was the parochial one of providing jobs for Pennsylvania's unemployed.

The dissent also explained the fallacy of the court's holding that any discrimination in the imposition of the axle tax was justified by the supposition that it merely compensated for registration fees, which are paid only by locally-based trucks (J.S. App. 44a-45a (emphasis in original)):

> What the majority ignores, however, is that every state maintains a system for registering trucks and every state imposes fees and taxes in conjunction with such registration. . . . The practical operation of Act 234, which does not restructure the entire Pennsylvania user fee system, does not serve to achieve equal treatment[;] rather it serves instead to shift an additional financial burden *only* upon interstate commerce. The protectionist nature of this legislation is evident and cannot be ignored. Should every state impose such a tax to burden only out-of-state registered vehicles, the impact upon interstate commerce would indeed be crippling.

INTRODUCTION AND SUMMARY OF ARGUMENT

State legislatures are naturally tempted to raise needed revenues in the manner most agreeable to the voters who elect them. If they can shift to outsiders the burdens of providing for their state's needs, they will likely do so. See *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 46 n.2 (1940).[7] It was in part a recognition of these tendencies—and of the destructive impact that parochial economic legislation could have on the union of states—that led to the adoption of the Commerce Clause. This case involves the effectiveness of that provision as an instrument for safeguarding the rights of persons seeking to do business in states other than their own against discrimination that favors local enterprise.

The problem is not simply the unfair and inhibiting character of any particular state's discriminatory actions, but the reverberations such actions produce. They provoke retaliatory enactments from other states that threaten the creation of numerous preferential trade areas and endanger the "free trade which the [Commerce] Clause protects." *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 329 (1977). Such artificial impediments to the free flow of commerce also obstruct market forces and economic efficiency and interfere with rational, tax-neutral decision-making. See *Westinghouse Electric Corp.* v. *Tully*, 466 U.S. 388, 406 (1984).

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[7] As one noted commentator has observed:

> Each state has an economic incentive to impose taxes whose burden will fall, so far as possible, on residents of other states. Such an incentive is undesirable. It . . . deflects the state from the search for taxing methods that maximize efficiency and distributive criteria for the nation as a whole. . . . States may also use taxation not to raise revenue but to protect the state's producers or other sellers from the competition of nonresidents. . . . [S]ince special interests frequently obtain legislation that reduces efficiency, we should not be surprised to find that with states as with nations, taxes that discriminate against importers are sometimes imposed.

R. Posner, *Economic Analysis of Law* 602 (3d ed. 1986).

Accordingly, state legislation that discriminates in favor of in-state over out-of-state interests is subject to "the strictest scrutiny." *Hughes* v. *Oklahoma*, 441 U.S. 322, 337 (1979). "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, [the Court has] generally struck down the statute without further inquiry." *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 106 S.Ct. 2080, 2084 (1986).

Under these principles, a state tax is unconstitutional either (1) if it expressly discriminates or is structured in relation to other tax statutes to discriminate against interstate commerce, or (2) if in its effect and practical operation it so discriminates. *Maryland* v. *Louisiana*, 451 U.S. 725, 745 (1981). The Pennsylvania axle tax violates the first of these proscriptions, and both the axle tax and the marker fee violate the second.

I.

The axle tax plainly is structured to discriminate against out-of-state taxpayers. The statute enacting it, while purportedly taxing in-state and out-of-state vehicles alike, simultaneously reduced the registration fees for Pennsylvania-registered trucks by an amount identical to the axle tax in nearly all cases, thereby causing virtually the entire impact of the new levy to fall on out-of-state operators. This manipulation of the highway tax system, which the State admits was intended to benefit local truckers, renders the tax legally equivalent to one imposed solely on non-Pennsylvania-based operators.

This discrimination against interstate commerce cannot be justified under the "compensatory tax" doctrine. For that doctrine to apply, the challenged tax must offset a tax imposed *solely on in-state interests* for a *substantially equivalent* taxable event, so that the overall tax system results in an equal tax burden for in-state

and out-of-state taxpayers. *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 643 (1984). Appellees have failed to sustain their burden of showing that the axle tax meets this standard.

First, truck registration fees do not constitute a tax solely on Pennsylvania-based trucks, for which the axle tax could be viewed as compensating. *All* trucks operating in Pennsylvania already satisfy that State's registration fee requirement. Those that are base-registered in Pennsylvania or in another IRP state make payments to Pennsylvania; those based in other states satisfy the same requirement by paying their home state's registration fee pursuant to reciprocity arrangements between Pennsylvania and those other states. Second, the axle tax and the registration fee do not relate to substantially equivalent events. Payment of Pennsylvania's registration fee entitles a Pennsylvania-based truck to engage in Pennsylvania-intrastate as well as in interstate operations and, under reciprocity arrangements, to use the highways in many states; on the other hand, the axle tax enables a non-Pennsylvania-based truck to operate only in Pennsylvania and to do so only for interstate carriage. Third, appellees have presented no evidence showing that the legislature intended the axle tax to redress any existing imbalance in tax burdens or that it actually had that effect.

Not surprisingly, in the face of this Court's precedents, the State now concedes that the compensatory tax doctrine does not support the axle tax and that the Pennsylvania Supreme Court's reliance on that doctrine was erroneous.

II.

By imposing essentially flat charges that do not vary according to highway mileage, both the axle tax and the marker fee discriminate in practical effect against out-of-state trucks. Since these taxes are not proportional to the extent of a vehicle's use of the roads within Pennsylvania, they result in per-mile costs that are much

lower for heavy users of the State's highways than for less frequent users. And as common experience suggests and the record in this case demonstrates, the average Pennsylvania-registered truck uses the roads in the State far more extensively than the average out-of-state truck and thus enjoys the benefit of a lower effective per-mile tax rate. Furthermore, the non-proportional measure of these taxes, which were intended to compensate the State for deterioration to its highways caused by the operation of larger trucks, in fact bears no relationship to the level of use that a truck actually makes of the State's roads or the amount of wear and tear attributable to its operations.

A state tax violates the Commerce Clause if it has a discriminatory impact on interstate commerce or is not fairly related to the services provided by the state. See *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977). This Court's decisions recognize that a flat tax, which by definition is not proportional to the taxpayer's activities, necessarily operates to discriminate against interstate commerce because of the out-of-state taxpayer's lesser presence in the state. See *Nippert* v. *Richmond*, 327 U.S. 416 (1946). It follows that taxes like the axle tax and marker fee, which result in a disproportionate burden on out-of-state taxpayers and employ a measure unrelated to the services furnished by the State, are invalid.

The adoption of comparable taxes by other states would impose a devastating cumulative burden on interstate motor carriers. Indeed, since 1980 six states have followed Pennsylvania's lead and enacted flat highway taxes. In response to these discriminatory exactions, a number of other states have imposed retaliatory highway taxes, thereby exacerbating the discrimination against and burden on interstate trucks. This trade war among the states, involving local preferences and retaliatory countermeasures, is particularly injurious to the trucking industry and is precisely the sort of economic conflict that the Commerce Clause was designed to prevent.

This Court's decision of a half-century ago in *Aero Mayflower Transit Co.* v. *Georgia Public Serv. Comm'n*, 295 U.S. 285 (1935), cannot serve to justify these adverse effects on interstate commerce. That case is inconsistent with Commerce Clause principles recognized in subsequent opinions of this Court and fails to account for the practical realities of the modern interstate trucking industry. Since every state today employs mileage-related highway taxes that provide a workable alternative for compensating the state for wear and tear to its roads, there is no need to sustain discriminatory state taxation.

ARGUMENT

I. THE PENNSYLVANIA AXLE TAX VIOLATES THE COMMERCE CLAUSE BECAUSE IT IS STRUCTURED TO FALL ALMOST ENTIRELY ON OUT-OF-STATE TRUCKS.

The legislation enacting the Pennsylvania axle tax also reduced the registration fees for Pennsylvania-based trucks subject to the tax by the amount of the new levy. Thus, while the axle tax appears on its face to apply equally to in-state and out-of-state trucks, the simultaneous and offsetting reduction in Pennsylvania's registration fees effectively relieves in-state trucks of the burden of the axle tax and imposes virtually the entire cost of the tax on interstate truckers operating non-Pennsylvania-based vehicles on the State's highways. As of the effective date of the axle tax, for example, the owner of a five-axle truck registered in New Jersey who wished to engage in interstate commerce on Pennsylvania's highways had to pay a new tax of $180 for the privilege. If the same truck were registered in Pennsylvania, however, it would not have had to pay a penny more to Pennsylvania in order to conduct identical operations on the same highways. In fact, the axle tax drew a prompt reaction from New Jersey, whose legislature adopted a resolution describing it as "causing great hardship for the owners of trucks registered in New Jersey [and] . . . other states" and condemning the tax as "highly

inequitable inasmuch as the principal burden falls upon truck owners who are not resident in Pennsylvania." J. Res. 10, 200th Leg., 2d Sess., 1983 N.J. Sess. Law Serv. 1478 (West) (reproduced as an Appendix, *infra*, pages 1a-2a).

The Pennsylvania Supreme Court acknowledged (J.S. App. 30a-31a), and appellees concede (*id.* at 31a; Mot. to Aff. 7-8), that the actual burden of the axle tax falls almost entirely on out-of-state trucks. In the words of the court below, Pennsylvania "intended to lessen the burden imposed upon 'local commerce'" by imposing a new burden on out-of-state competitors. J.S. App. 31a. Because Pennsylvania has structured the axle tax to discriminate against non-Pennsylvania-based trucks, the tax runs afoul of the most basic requirements of the Commerce Clause.

A. The Axle Tax Effectively Applies Only To Out-Of-State Trucks.

1. *The Anti-Discrimination Principle.* The decisions of this Court have long established that the Commerce Clause prohibits state taxes that expressly favor in-state over out-of-state commerce. See, *e.g.*, *Welton* v. *Missouri*, 91 U.S. (1 Otto) 275, 280, 281 (1876); *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). The same standard of nondiscrimination is applicable to state taxes or fees for the use of public facilities. See *Guy* v. *Baltimore*, 100 U.S. (10 Otto) 434 (1880).

In adherence to this principle, the Court recently has overturned a variety of discriminatory state tax laws. See *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984); *Armco Inc.* v. *Hardesty*, 467 U.S. 638 (1984); *Westinghouse Electric Corp.* v. *Tully*, 466 U.S. 388 (1984); *Maryland* v. *Louisiana*, 451 U.S. 725 (1981); *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318 (1977). As the Court stated in *Bacchus Imports*, 468 U.S. at 268 n.8, its cases "make clear" that "discrimination between in-state and out-of-state taxpayers" is "offensive to the Commerce Clause."

Numerous state and federal courts have applied this principle to invalidate discriminatory taxes imposed on interstate trucking. See, *e.g.*, *American Trucking Associations, Inc* v. *Conway*, 508 A.2d 405 and 508 A.2d 408 (Vt. 1986), petitions for cert. filed, Nos. 86-69 and 86-276 (U.S. July 21 and Aug. 22, 1986); *American Trucking Associations, Inc.* v. *Quinn*, 437 A.2d 623, 627 (Me. 1981); *American Trucking Associations, Inc.* v. *O'Neill*, 522 F. Supp. 49 (D. Conn. 1981); *Private Truck Council of America, Inc.* v. *New Hampshire*, No. 86-088 (N.H. Aug. 12, 1986); *Private Truck Council of America, Inc.* v. *Secretary of State*, 503 A.2d 214 (Me.), cert. denied, 106 S. Ct. 1997 (1986); *Huie* v. *Private Truck Council of America, Inc.*, 466 N.E.2d 435 (Ind. 1984).

2. *The Discriminatory Character of the Axle Tax.* In light of this "fundamental . . . antidiscrimination principle" (*Maryland* v. *Louisiana*, 451 U.S. at 754), we take it as indisputable that the Pennsylvania axle tax, if expressly limited to out-of-state trucks, could not stand under the Commerce Clause. The axle tax is, in substance, so limited.

To be sure, viewed on its face and in isolation from the changes to the rest of Pennsylvania's highway tax system that accompanied it, the axle tax does not appear to discriminate against out-of-state trucks; by its terms it applies equally to all trucks of the prescribed weight wherever they may be registered. But there can be no doubt that the legislation creating the axle tax was in fact structured to discriminate against out-of-state trucks. The trial court found (J.S. App. 61a) that

> [t]he registration fee reductions almost always offset [the axle tax] assessments, virtually insulating operators of locally but not foreign, registered vehicles from the levy's financial impact. . . . [O]perators of foreign-registered vehicles . . . bear the full brunt of the tax.

The Pennsylvania Supreme Court accepted this finding (*id.* at 9a, 17a) and acknowledged that the "registration

fee reduction almost exactly offsets the $36.00 per axle tax" (*id.* at 30a).

Likewise, appellees conceded in the courts below that "the reduction in Pennsylvania registration fees equaled the amount of the axle tax in most cases, and substantially offset the amount of the axle tax in the other cases" (J.S. App. 15a). Appellees have also conceded in this Court that "[t]he effect of the lowered registration fee was to offset approximately the effect of the Axle Tax for most trucks registered in Pennsylvania" (Mot. to Aff. 7-8). Appellees have further admitted that in adopting these offsetting reductions the State "intended to lessen the burden upon 'local commerce'" (J.S. App. 31a). "Thus, we need not guess at the legislature's motivation, for it is undisputed that the purpose of the exemption was to aid [the State's] industry." *Bacchus Imports*, 468 U.S. at 271.

The record accordingly demonstrates—indeed it is uncontroverted—that both the purpose and the effect of the 1982 legislation were to aid local truckers by imposing the burden of the axle tax on out-of-state vehicles. The Commerce Clause plainly prohibits the State from achieving this discrimination directly. See, *e.g.*, *Bacchus Imports*, 468 U.S. at 270, holding that either a "discriminatory purpose" or a "discriminatory effect" is independently sufficient to invalidate a state tax statute. The constitutional protection for interstate commerce cannot be circumvented by the transparent means employed here to reach the same discriminatory end.

This Court has cautioned that "[t]he commerce clause forbids discrimination, whether forthright or ingenious." *Best & Co.* v. *Maxwell*, 311 U.S. 454, 455 (1940). Under this standard, a state may not seek to discriminate "by indirection." *Guy* v. *Baltimore*, 100 U.S. at 443. It is the economic realities of the tax, not the formalities of legislative drafting, that govern for Commerce Clause purposes. See *Complete Auto*, 430 U.S. at 284; *Westinghouse Electric*, 466 U.S. at 405. The constitutionally

required "equality for . . . [interstate] commerce is measured in dollars and cents, not legal abstractions." *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 70 (1963).

In determining whether a tax discriminates against interstate commerce, therefore, the tax cannot be judged in isolation but rather "must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme." *Maryland* v. *Louisiana*, 451 U.S. at 756. In a number of recent decisions, this Court has found a facially neutral tax to be discriminatory because of exemptions or tax reductions elsewhere in the state code. In *Maryland* v. *Louisiana*, for example, Louisiana imposed a first-use tax on natural gas. "The Act itself, as well as provisions found elsewhere in the state statutes, provided a number of exemptions from and credits for" the first-use tax, including credits on other Louisiana taxes for first-use tax payments (451 U.S. at 732-733). Looking at the related provisions of the State's tax scheme, the Court held that the first-use tax "unquestionably discriminates against interstate commerce in favor of local interests as the necessary result of various tax credits and exclusions" that "substantially protected [Louisiana consumers] against the impact of the [tax]" (*id.* at 756, 757). See also *Bacchus Imports*, 468 U.S. at 268 (exemption of local liquors from excise tax); *Westinghouse Electric*, 466 U.S. at 404-405 (credit on franchise tax for exports shipped from regular place of business in the state).

This Court's holding in *Maryland* v. *Louisiana* is controlling here. The same enactment that created the Pennsylvania axle tax simultaneously made equal reductions in registration fees for Pennsylvania vehicles subject to the new tax. The effect of this statutory scheme—which the State foresaw and intended, and which appellees and the court below have conceded—was to insulate Pennsylvania-registered trucks from the impact of the axle tax and to impose the entire burden of the tax on

out-of-state trucks. Thus, by its very structure and design, the axle tax discriminates against non-Pennsylvania-registered trucks and is indistinguishable from a tax that by its terms is levied solely against such vehicles.

The Supreme Court of Vermont recently applied this analysis to strike down a highway tax that discriminated in favor of local carriers. In 1982, Vermont enacted a $50 annual fuel user's license fee that was applicable on its face to all trucks. However, the same Act reduced the annual registration fee for Vermont-registered trucks subject to the fuel user's charge by an identical $50. The Vermont Supreme Court held that this tax scheme violated the Commerce Clause. *American Trucking Associations, Inc.* v. *Conway*, 508 A.2d at 412. Explaining that it was "unable to ignore" the obvious effect of the statutory structure, the court ruled that the "challenged provisions of [the Act] discriminate against interstate commerce by providing a direct commercial advantage to Vermont truckers . . . [by] shift[ing] the entire impact of the user fee legislation onto foreign operators" (*ibid.*). The same rationale applies to invalidate the Pennsylvania axle tax.

B. The Discriminatory Axle Tax Cannot Be Justified Under The Compensatory Tax Doctrine.

The court below did not dispute that Pennsylvania, by manipulating registration fees for in-state vehicles, basically confined the impact of the axle tax to out-of-state trucks. Nevertheless, the court upheld the axle tax on the ground that Pennsylvania-registered trucks paid registration fees to Pennsylvania that, even after being reduced to offset the axle tax, were higher than the payments made directly to the State by operators of out-of-state trucks. In the court's view, it was "entirely proper for [the State] to enact a compensatory tax to neutralize or partially offset an economic advantage previously enjoyed by interstate commerce to the disadvantage of local commerce that was caused by operation of [the State's] taxing scheme." J.S. App. 33a.

In so ruling, the Pennsylvania Supreme Court relied on several decisions of this Court applying the so-called "compensatory" or "complementary" tax doctrine. However, the court's reasoning represents a serious misunderstanding of that doctrine. Every other court to consider the issue has concluded that vehicle registration fees are not complementary to other highway use taxes and that a highway use tax that discriminates against interstate commerce cannot be justified by reference to the registration fees paid by in-state carriers. Indeed, appellees themselves have acknowledged this defect in the decision below and now concede (Mot. to Aff. 15-16 & n.4) that the axle tax cannot be sustained under the compensatory tax doctrine.

1. *The Compensatory Tax Doctrine.* In certain narrow and well-defined circumstances, this Court has upheld a tax that discriminated on its face against interstate commerce on the ground that the tax merely "compensated" for an equivalent tax that applied exclusively to in-state taxpayers or transactions. See, *e.g.*, *Henneford* v. *Silas Mason Co.*, 300 U.S. 577 (1937). At the same time, the Court has understood that the ban against discrimination would be totally ineffective if a state could defend a tax imposed solely or disproportionately on out-of-state businesses merely by pointing generally in the direction of some other tax or taxes paid only by its domiciliaries. Accordingly, to ensure effective protection of interstate commerce, the Court has strictly limited the scope of the compensatory tax doctrine. For the doctrine to apply, the taxes must be imposed on "substantially equivalent event[s]." *Armco*, 467 U.S. at 643; *Maryland* v. *Louisiana*, 451 U.S. at 759. In other words, each tax must serve a "complementary function" to the other. *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575, 582 (1983).

In addition, the taxes, taken together, must result in equal tax burdens. "The common thread running through the cases upholding compensatory taxes is the equality of treatment between local and interstate commerce."

Maryland v. *Louisiana*, 451 U.S. at 759. Under this "strict rule of equality" (*Halliburton Oil*, 373 U.S. at 73), even an "indirect" or "slight" disparity is forbidden. *Westinghouse Electric*, 466 U.S. at 397, 405. Thus, under a true compensatory tax, "when the account is made up, the stranger from afar is subject to no greater burdens . . . than the dweller within the gates. The . . . sum is the same when the reckoning is closed." *Silas Mason*, 300 U.S. at 584.

To invoke the compensatory tax doctrine, therefore, the state must demonstrate that an apparently discriminatory levy is offset in fact by a specific tax imposed only on in-state businesses for a substantially equivalent event, and that the result is to equalize previously unequal tax burdens. Only such a showing can provide the constitutionally necessary assurance that there is no actual discrimination against interstate commerce. This Court has never uncritically accepted the word of state taxing authorities that there is no inequality in a facially discriminatory levy. On the contrary, the Court has repeatedly rejected attempts by states to justify discriminatory taxes under the compensatory tax doctrine. See *Armco*, 467 U.S. at 642-644; *Westinghouse Electric*, 466 U.S. at 402-406; *Minneapolis Star*, 460 U.S. at 581-582; *Maryland* v. *Louisiana*, 451 U.S. at 758-762; *Boston Stock Exchange*, 429 U.S. at 328-332. Those decisions confirm that the doctrine cannot save Pennsylvania's discriminatory axle tax.

2. *The Inapplicability of the Compensatory Tax Doctrine.* "The concept of a compensatory tax first requires identification of the burden for which the State is attempting to compensate." *Maryland* v. *Louisiana*, 451 U.S. at 758. Nonetheless, the court below made no attempt to establish that the Pennsylvania registration fee constitutes a tax borne only by in-state trucks and thus imposes a burden for which the axle tax may validly compensate. In fact, *all* trucks operating in Pennsylvania

already satisfy that State's registration fee requirement. Those that are base-registered in Pennsylvania or another IRP state make payments to Pennsylvania; those based in other states satisfy the same requirement by paying their home state's registration fee, pursuant to reciprocity arrangements between Pennsylvania and their state. See J.A. 237.

Moreover, the Pennsylvania Supreme Court failed to recognize that the axle tax and the registration fee do not relate to "substantially equivalent events" (451 U.S. at 759) because they do not serve the same function or purchase the same rights. By virtue of the reciprocity agreements mentioned above, payment of Pennsylvania's registration fee buys the Pennsylvania-based truck the right to operate on the highways of many other states as well; it also (together with other fees and administrative requirements) purchases the privilege of engaging in *intrastate* for-hire carriage in Pennsylvania. In contrast, payment of the axle tax buys the non-Pennsylvania-based truck no more than the right to use Pennsylvania's highways, and even there only to transport *interstate* shipments.

Because they purchase fundamentally different rights, the Pennsylvania registration fee and the Pennsylvania axle tax cannot be considered "compensatory" taxes. See J.S. App. 44a-45a (Nix, C.J., dissenting). This is precisely why the Supreme Courts of Vermont, New Hampshire, and Maine have rejected the contention that registration fees may be held to complement or compensate for otherwise discriminatory highway use charges. As the Supreme Judicial Court of Maine explained in *American Trucking Associations, Inc.* v. *Quinn*, 437 A.2d at 626-627:

> When an owner or operator of a Maine-based truck pays his registration fee, he purchases the right to operate in any of 46 states; the [challenged] highway use fee . . . , by contrast, buys for the foreign-based truck only the right to use Maine roads. In a

> practical economic sense, reciprocity represents an indirect contribution by foreign-based trucks to the treasury of the State of Maine; the agreement of their home states not to tax Maine-based trucks leaves Maine free to collect more than it otherwise could from its own truckers.

See also *Private Truck Council of America, Inc.* v. *New Hampshire*, slip op. 4; *American Trucking Associations, Inc.* v. *Conway*, 508 A.2d at 407-408, 412-413.

Furthermore, even if registration fees could in appropriate circumstances be considered complementary to highway use taxes, the requisites of "equivalen[ce]" (*Maryland* v. *Louisiana*, 451 U.S. at 759) and "strict . . . equality" (*Halliburton Oil*, 373 U.S. at 73) are wholly lacking here. The mere fact that registration fees are substantially higher than the axle tax, upon which the court below placed great weight (J.S. App. 33a), does not satisfy the requirements of the compensatory tax doctrine. See *Armco*, 467 U.S. at 642-643 (holding that a much larger manufacturing tax was not complementary to a wholesaling tax); *Minneapolis Star*, 460 U.S. at 581-582 (holding that Minnesota's valid general sales tax, though considerably greater, was not complementary to a paper and ink tax that discriminated in violation of the First Amendment). Rather, as discussed above, the difference in the amounts of the Pennsylvania registration fee and axle tax reflects the different rights acquired by payment of each charge. See page 23, *supra*.

More important, the Pennsylvania Supreme Court could point to nothing in the text or history of the axle tax legislation to indicate that it was designed to redress an existing imbalance in tax burdens or that it would result in equality of tax treatment for in-state and out-of-state truckers. As Chief Justice Nix noted in dissent (J.S. App. 41a-42a), "there is nothing in the statute itself or in the circumstances surrounding the enactment of Act

234 which adds legitimacy to [the State's] position that it was designed to restructure the tax burden upon the trucking industry in this Commonwealth." The record is barren of *any* analysis showing that the legislature believed that non-Pennsylvania-registered trucks were in fact bearing less than their fair share of highway costs under the prior tax system. Nor does it reflect *any* consideration of the structure and size of the adjustment that might be needed to equalize the tax burdens.[8] The compensatory tax doctrine cannot be applied in such a legislative vacuum. See *Armco*, 467 U.S. at 643 ("[m]anufacturing frequently entails selling in the State, but we cannot say which portion of the manufacturing tax is attributable to manufacturing, and which portion to sales").

This Court has recognized that taxes that "are easily tailored to single out interstate businesses and subject them to effects forbidden by the Commerce Clause . . . must receive the careful scrutiny of the courts." *Complete Auto*, 430 U.S. at 288-289 n.15. Exacting review is especially necessary for purportedly "compensatory" taxes, which by definition discriminate on their face against interstate commerce and thus threaten a paramount policy of the Constitution. To permit state courts to rationalize discrimination against interstate commerce on an unsupported *post hoc* basis, as the Pennsylvania

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[8] In fact, there is convincing evidence that the axle tax was *not* designed as a "compensatory" tax. Registration fees were not reduced across the board for Pennsylvania-based trucks, which should have been done if the reduction that was made truly reflected a determination that local commerce was burdened with an excessive share of highway costs. Rather, fees were reduced only for vehicles weighing more than 26,000 pounds—*the very same group to which the new axle tax was being applied.* The anomalous result of this purported "rational restructuring" was that, although registration fees ordinarily increase with truck weight, the $270 registration fee for Class 8 vehicles (21,000-26,000 pounds) is higher than the $243 fee for Class 9 vehicles (26,001-30,000 pounds). 75 Pa. Cons. Stat. Ann. § 1916(a) (J.S. App. 87a).

Supreme Court did here, would open the way to ready evasion of the Commerce Clause's prohibition.[9]

3. *Pennsylvania's Tax Redistribution Argument.* In this Court, appellees have acknowledged that Pennsylvania's axle tax and registration fees are *not* compensatory, have disavowed any argument under the compensatory tax doctrine, and have conceded that the Pennsylvania Supreme Court's reliance on that doctrine was "erroneous." See Mot. to Aff. 15-16 & n.4. As the foregoing discussion makes clear, appellees' concessions are compelled by this Court's recent decisions.

Having cast aside the compensatory tax doctrine, appellees seek to defend the axle tax on the theory that the offsetting reductions in the registration fees for Pennsylvania-based vehicles merely accomplished a redistribution of a tax burden that had previously fallen too heavily on local motor carriers. See Mot. to Aff. 10-14. This argument—which represents a diluted version of the compensatory tax argument—founders on two grounds.

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[9] The cases cited by the Pennsylvania Supreme Court (J.S. App. 33a-34a) lend no support to its decision. In *Halliburton Oil, supra,* this Court in fact struck down a discriminatory state tax, finding that it was not saved by the compensatory tax doctrine because its unequal treatment of in-state and out-of-state taxpayers violated the doctrine's "strict rule of equality" (373 U.S. at 73). In *Henneford* v. *Silas Mason Co., supra,* the Court upheld the paradigm of compensatory taxes—state sales and use taxes—but only after determining, based on a careful examination of the state tax structure, that "[e]quality is the theme that runs through all the sections of the statute" (300 U.S. at 583) and that the burden imposed under one tax was "balanced by an equal burden" under the other (*id.* at 584). *Alaska* v. *Arctic Maid,* 366 U.S. 199 (1961), turned on the fact, as the Court recognized in *Armco* (467 U.S. at 643 n.6), that the taxes at issue were imposed on entirely different businesses and therefore were not discriminatory; in contrast to *Arctic Maid* and as in *Armco,* there can be no doubt that Pennsylvania-registered and non-Pennsylvania-registered trucks "operate in precisely the same business" (467 U.S. at 643 n.6).

To begin with, as previously explained, there is nothing in the legislative record to indicate that the Pennsylvania legislature was in fact attempting to restructure the tax system in order to relieve a disproportionate tax burden on local commerce. Indeed, beyond appellees' bald assertion, there is simply no evidence to support the factual premises of their argument—that an imbalance existed in the prior tax system and that the amount of the axle tax was calculated to redress any such imbalance. This absence of proof itself is sufficient to require rejection of the State's contention. See *Westinghouse Electric*, 466 U.S. at 405-406, striking down a discriminatory tax despite the state's generalized assertion that it offset a "relatively high franchise tax" imposed on local business firms and was reasonable "when viewed in terms of the whole New York tax scheme."

In addition, by eschewing the compensatory tax doctrine, appellees have abandoned the only legal standard that, as the court below realized (J.S. App. 33a-34a), could serve to sustain a discriminatory levy like the axle tax. The compensatory tax doctrine was devised to address precisely the issue that appellees claim is involved in this case: whether a tax that discriminates against interstate commerce can be justified as necessary to redress a prior disproportionate tax burden on intrastate or locally based commerce. See, *e.g.*, *Boston Stock Exchange*, 429 U.S. at 323 (applying the compensatory tax doctrine to evaluate a discriminatory tax enacted because of "concern[]" that the pre-existing "tax created a competitive disadvantage" for in-state transactions).

Apparently recognizing that they are unable to satisfy any of the requirements laid down by this Court under the compensatory tax doctrine, appellees now attempt to resort to an amorphous approach that rests on unsubstantiated assertions and *post hoc* rationalizations. In so doing, appellees have cut themselves adrift from any arguable basis for upholding the axle tax and have virtually confessed the infirmity of the tax under this Court's decisions.

II. THE PENNSYLVANIA MARKER FEE AND AXLE TAX VIOLATE THE COMMERCE CLAUSE BECAUSE THEY IMPOSE A HIGHER EFFECTIVE TAX RATE ON OUT-OF-STATE TRUCKS.

The previous discussion demonstrates that Pennsylvania's tax system is structured to place the cost of the axle tax on vehicles registered outside the State. But wholly apart from that flaw, the Pennsylvania highway tax system suffers from another failing: both the axle tax and the marker fee discriminate against interstate commerce because they operate to impose an effective tax rate, in terms of cost per mile, that is many times higher for the typical truck registered outside Pennsylvania than for a comparable truck registered in the State. Since 1980, six other states have adopted highway taxes having these characteristics, with a predictably burdensome impact on interstate commerce. If all states were to do so, the consequences would be devastating.

A. The Commerce Clause Prohibits A State Tax That In Practical Effect Discriminates Against Out-Of-State Taxpayers And Is Not Fairly Related To Services Provided By The State.

The Constitution enjoins "discrimination against interstate commerce, whatever its form or method." *South Carolina State Hwy. Dep't* v. *Barnwell Bros.*, 303 U.S. 177, 185 (1938). Under well-settled principles, the Commerce Clause condemns a state statute that, although facially neutral, is discriminatory in effect. Rather than looking only to the statutory provision on its face, this Court has "determine[d] whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Best & Co.* v. *Maxwell*, 311 U.S. 454, 456 (1940). Thus, "[t]he principal focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects." *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. 27, 37 (1980).

In line with these principles, the Court has repeatedly invalidated state tax statutes that discriminated against interstate commerce by operating in a manner that favored in-state over out-of-state companies. As early as *Robbins* v. *Shelby County Taxing Dist.*, 120 U.S. 489 (1887), the Court struck down a flat tax that, while facially neutral, had a discriminatory impact on out-of-state businesses. There, the Court held unconstitutional a so-called "drummer's tax" on persons who engaged in the sale of goods in Memphis without having a fixed place of business in the city. The Court pointed out that the tax was "discriminative against the merchants and manufacturers of other states" (*id.* at 498) and that "[t]his kind of taxation is usually imposed at the instance and solicitation of domestic dealers, as a means of protecting them from foreign competition" (*ibid.*).

Likewise, in *Sprout* v. *South Bend*, 277 U.S. 163 (1928), the Court overturned a city licensing fee for buses, again recognizing that a facially neutral tax worked to discriminate against out-of-state companies because the tax was "the same for busses plying the streets continuously in local service and for busses making, as do many interstate busses, only a single trip daily" (277 U.S. at 170). In *Best & Co.* v. *Maxwell*, *supra*, the Court struck down a facially neutral privilege tax on itinerant sellers, holding that the tax was unconstitutionally discriminatory because it fell with a disproportionately heavy impact on out-of-state businesses and necessarily had no relation to such companies' actual activities in the state (311 U.S. at 456-457).

Finally, in *Nippert* v. *Richmond*, 327 U.S. 416 (1946), the Court adhered to this "long line" of decisions (*id.* at 417-418) by invalidating a flat tax on solicitors as discriminating against out-of-state merchants. The Court observed that "a single act of . . . solicitation would bring the [flat tax] into play" and that the tax "inherently bore no relation to the volume of business done or of returns from it" (*id.* at 427). In addition, the Court took note of the "common knowledge" that tax statutes

that discriminate against out-of-state businesses are "often if not always the object of the local commercial influences which induce their adoption. Provincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation" (*id.* at 434).[10]

The itinerant merchants who were the victims of the discriminatory taxes invalidated in *Robbins*, *Best & Co.*, and *Nippert* were in precisely the same predicament as the interstate truckers taking the instant appeal. Because they were not based in the taxing jurisdiction, they were likely to conduct less of their business there and accordingly to find each transaction more heavily taxed than the same transaction engaged in by their competitors based in the taxing jurisdiction. Thus, the Pennsylvania axle tax and marker fee, like the drummer tax, "in . . . practical operation [are] capable of use . . . to place the merchant . . . doing business interstate at a disadvantage in competition with . . . [businesses] within the state." *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 56 (1940).

This Court's most recent decisions have distilled these controlling Commerce Clause principles into a four-part test. In *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. at 279, the Court held that a state tax is valid under the Commerce Clause only if it (1) has a substantial nexus with the state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state. The Court has reiterated this standard in virtually every subsequent case challenging a state tax under the Commerce Clause. See, *e.g.*, *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 617, 625-626 (1981); *Maryland* v. *Louisiana*, 451 U.S. at 754.

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[10] The Court has cited *Nippert* with approval in recent opinions. See, *e.g.*, *Westinghouse Electric*, 466 U.S. at 402-403; *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 615, 626, 629 (1981); *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. at 37; *Boston Stock Exchange*, 429 U.S. at 329.

The third prong of the *Complete Auto* test—nondiscrimination—protects interstate commerce by ensuring that it is not subjected to unfavorable treatment by the state. The fourth prong—proportionality—was explained in *Commonwealth Edison*, 453 U.S. at 626 (emphasis in original):

> [This] prong . . . imposes the additional limitation that the *measure* of the tax must be reasonably related to the extent of the [taxpayer's] contact [with the state], since it is the activities or presence of the taxpayer in the State that may properly be made to bear a "just share of [the] state tax burden."

See also *Armco*, 467 U.S. at 643 n.6 (the "fairly related" prong of *Complete Auto* recognizes that "an in-state [taxpayer] normally benefits to a greater extent from services provided by the State than does a transient [taxpayer]"); *Commonwealth Edison*, 453 U.S. at 645 & n.10 (Blackmun, J., dissenting on other grounds) (the *Complete Auto* test requires that a state "impose a proportional rather than a flat tax rate" in order to ensure that the tax is "fairly related to the services . . . provided by the State").[11]

Complete Auto and the earlier rulings that it synthesized unquestionably prohibit a state tax that, by failing to account for out-of-state companies' lesser presence in the state, operates to impose a greater tax burden on those companies than on in-state firms. In particular, a tax that, although facially neutral, results in a disproportionate burden on out-of-state businesses due to their more limited presence in the state is both discriminatory in effect and not fairly related to the services provided by the state. See L. Tribe, *American Constitutional Law* 356 (1978) (the Commerce Clause prohibits as "uncon-

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[11] As this Court recognized in discussing a different kind of tax, "[b]y its very nature an *unapportioned* gross receipts tax makes interstate transportation bear more than 'a fair share of the cost of the local government whose protection it enjoys.'" *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U.S. 653, 663 (1948) (emphasis added).

stitutionally discriminatory . . . state taxes non-discriminatory on their face which, without sufficient justification, impose economic burdens on interstate enterprises which are not in fact imposed on local competitors").

B. The Marker Fee And The Axle Tax Operate To Discriminate Against Out-Of-State Trucks By Subjecting Them To Higher Average Per-Mile Tax Costs.

Under the foregoing decisions of this Court, the Pennsylvania axle tax and marker fee cannot stand. The record in this case demonstrates that these two taxes are precisely the sort of discriminatory levies that the Commerce Clause forbids.

The axle tax and the marker fee both serve to raise revenue to defray the costs of maintaining Pennsylvania's highways, which are used by motor vehicles registered in Pennsylvania and in other states. It is undisputed that the amount of wear and tear caused by any particular vehicle varies directly with the number of miles it is driven and that, for any given amount of driving, the wear and tear caused by a vehicle is the same regardless of the state in which it is registered. The State's own experts so testified. J.A. 78, 82.

Accordingly, a rational highway "use" tax should be designed to vary with the extent of the taxpayer's use of the highways. This was not done, however, in the case of the marker fee, and it was done only to a limited extent in the case of the axle tax. The $25 marker fee had to be paid for a vehicle whether it traveled one mile on Pennsylvania's highways or 100,000 miles. The axle tax is fixed at $180 for five-axle trucks (most of the trucks subject to the tax have five axles), except that it is apportioned for the first 2,000 miles of operation at a rate of 9¢ per mile for such trucks. See note 2, *supra*. No matter how many miles in excess of 2,000 a truck drives on Pennsylvania's highways, and no matter how much wear and tear it thereby causes, it pays no additional axle tax.

The Court should not be surprised to learn that the non-proportional character of these Pennsylvania taxes is highly advantageous to trucks registered in Pennsylvania and disadvantageous to those registered elsewhere. A survey conducted by ATA and admitted in evidence in the marker fee case showed that the average Pennsylvania-based truck drove approximately 23,000 miles annually in the State, compared to about 4,500 miles for trucks based outside Pennsylvania. As a consequence, the per-mile cost of the marker fee averaged five times as much for vehicles registered outside Pennsylvania as for those registered in it. See J.A. 72, 76, 99, 101, 104, 105. There is no reason to assume that the same disparity would not exist with respect to the axle tax. This confirms the blatant discrimination that is "inherent" in flat taxes. *Best & Co.*, 311 U.S. at 455-456 n.3.

The State has contested the admissibility and reliability of ATA's survey,[12] but the basic finding of the survey—that a typical truck registered in Pennsylvania drives many more miles on Pennsylvania's highways than trucks registered in other states and therefore enjoys substantially lower per-mile marker fee and axle tax costs—is confirmed both by common sense and by the State's own data and submissions. For example:

• There were about 131,000 vehicles registered in Pennsylvania in 1981 whose owners were deemed to have paid Pennsylvania the marker fee, compared to 399,000 out-of-state vehicles for which markers were purchased in that period. J.A. 74, 89, 104. Although Pennsylvania-registered trucks thus constituted less than 25% of the total, they were responsible for approximately 65% of the miles driven on Pennsylvania's highways by trucks

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[12] The State's objections to the survey were repeatedly overruled by the trial court (see J.A. 65, 78, 84), which characterized the survey as "certainly relevant and material, and certainly hav[ing] a lot of probative value" (J.A. 67). The Pennsylvania Supreme Court did not overturn those evidentiary rulings, and it accepted the results of the survey for purposes of its decision.

weighing over 17,000 pounds. J.A. 85 (excluding 2-axle, 4-tire trucks).

• One of the State's exhibits in the axle tax case showed that Pennsylvania-based trucks drive 39.2% of their miles in Pennsylvania, compared to only 7.6% of total miles in Pennsylvania for trucks registered in other states. J.A. 170-171.[13] These state supplied data indicate a disparity even higher than the five-to-one ratio shown in the ATA survey.

• Various other exhibits submitted by the State in the axle tax case confirm that even vehicles engaged substantially in interstate commerce drive far more miles in their home states than they possibly could in any other state. Thus, one exhibit showed that vehicles registered in Pennsylvania and the surrounding states (excluding Delaware, which is atypical because of its size) averaged between 41% and 51% of their total miles in their state of registration (J.A. 186), while another exhibit reported that a group of Pennsylvania-based vehicles large enough to be subject to the axle tax drove 44.7% of their miles in Pennsylvania and no more than 8.8% in any other state (J.A. 199).

• Perhaps most telling is the fact that although trucks registered in Pennsylvania were responsible for somewhere between 45% and 65% of all miles driven on Pennsylvania's highways by trucks subject to the axle tax (*i.e.*, weighing over 26,000 pounds) (compare J.A. 195 with J.A. 99, 101), appellee Scheiner's affidavit admits (J.A. 207) that these vehicles accounted for less than 16% of total axle tax revenues.[14]

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[13] These figures do not take into account the large number of Pennsylvania-registered trucks that drive 90% or more of their miles within the State and therefore do not file fuel use tax reports. When all Pennsylvania-registered trucks over 17,000 pounds are included in the total, the proportion of Pennsylvania miles to total miles driven by such trucks increases from 39.2% to 60%. J.A. 200.

[14] This characteristic of taxes not proportioned to mileage is not unique to Pennsylvania. As explained in the Jurisdictional State-

C. The Adoption By Numerous States Of Taxes Like Pennsylvania's Would Impose A Crippling Cumulative Burden On Interstate Motor Carriers.

While the interstate trucking industry stands ready and willing to shoulder its fair share of the tax burden relating to the construction and upkeep of Pennsylvania's highways, the foregoing figures demonstrate beyond cavil that the marker fee and axle tax work egregious discrimination against businesses located outside the State. What is more, if Pennsylvania may lawfully impose this kind of tax, there can be no constitutional impediment to other states' doing the same, like 50 separate principalities each advancing the parochial interests of its inhabitants at the expense of "foreigners." See *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753, 759 (1967). The cumulative consequences of such a regime of taxation would cripple interstate commerce and nullify the fundamental objective of the Commerce Clause—to form an economic union in which no material advantage or detriment attaches to the election to engage in interstate rather than local commerce. See J.S. App. 45a (Nix, C.J., dissenting).

The adverse impact on interstate commerce is vividly illustrated by examining the consequences if every state were to impose an axle tax like Pennsylvania's.[15] Consider two carriers that each operate 100 five-axle trucks of the same weight over the same distance, *e.g.*, 96,000

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ment in *American Trucking Associations, Inc.* v. *Gray*, appeal pending, No. 86-358 (U.S. Sept. 3, 1986), at 2-4, 15-17, Arkansas' highway use equalization tax of $175 per year also produces dramatically lower per-mile costs for trucks registered in Arkansas than for trucks based in other states.

[15] At present, seven states have highway use taxes that are flat (like the marker fee) or not proportioned to highway use (like the axle tax). See 86-358 J.S. 7-8 & n.3 (challenging Arkansas' HUE tax). If the Court sustains the taxes at issue in this case despite their discriminatory effect, further proliferation of such taxes would thereby be encouraged. The fold-out table printed as Appendix K to the Jurisdictional Statement graphically demonstrates the spread of discriminatory state highway taxes.

miles per year for each truck. If one carrier were to operate exclusively within a single state, it would pay a tax of $18,000 to that state ($180 x 100), or a bit less than two-tenths of a cent per mile of operation. If the second carrier were to distribute its operations equally in all 48 of the continental United States, so that each truck drove 2,000 miles per year in each state, that carrier would cause no more wear and tear to the highways but would have to pay $864,000 for the same miles of operation ($180 x 100 x 48), or nine cents per mile.

In the real world, of course, the disparities are not so extreme; but the record shows that trucking companies often do business in all 48 states (J.A. 57) and that replication of flat taxes in each state in which an interstate carrier operates could be disastrous to its financial viability. For instance, it was stipulated in the marker fee case that if each state in which appellant Old Dominion Freight Line operated were to impose a marker fee like Pennsylvania's, the cost to Old Dominion of qualifying all its vehicles to operate throughout its system in 1981 would have been about $350,000, approximately seven times its net pre-tax income for the year. J.A. 28. And the cumulative impact of the far larger axle tax would be many times greater. The Commerce Clause prohibits states from forcing businesses to shoulder such a staggering tax burden solely because they elect to transact business in many states rather than just one or two. See *Nippert*, 327 U.S. at 434.

Pennsylvania itself has recognized the potential of flat highway taxes to create serious burdens of this type.[16] A

[16] Representative Wenger, an opponent of the marker fee, warned of the unfairness of such a tax and the hardships it would cause even for relatively modest levels of interstate activity (J.A. 114-115):

> We can see that if neighboring states pass similar legislation in retaliation, for instance, you could have a farmer with a farm truck, one truck, that is used only seasonally, and he might take his produce, his apples, or his peaches[,] into New York to sell them. He would have to buy a sticker there. He might go into the State of Maryland to buy fertilizer

report prepared in 1983 by the Pennsylvania General Assembly's Legislative Budget and Finance Committee evaluated the axle tax after it had been in effect for about a year.[17] One of the concerns expressed in the report related to the actual or impending adoption by ten states of retaliatory taxes to be imposed on Pennsylvania-registered trucks. Although Pennsylvania's axle tax costs no more than $180 per truck, the report pointed out (Section I, page 2) that "[i]f and when the retaliatory tax becomes effective in all ten such states, the potential additional cost to a Pennsylvania-based truck that travels through these states is $1,675 per year."

D. Pennsylvania's Discriminatory Highway Taxes Have Provoked Economic Retaliation By Other States.

Within three months of the effective date of Pennsylvania's axle tax, its neighbor New Jersey had adopted a resolution that not only condemned the tax as discriminatory (see pages 15-16, *supra*), but urged other states "to adopt retaliatory measures against the Commonwealth of Pennsylvania in regard to this inequitable tax" (App., *infra*, 1a). This tellingly demonstrates the propensity of discriminatory taxes to generate the kind of trade war among the states that the Commerce Clause was meant to prevent.

Over the past seven years, six states in addition to Pennsylvania (Arkansas, Indiana, Kentucky, Maryland, New Jersey, and Vermont) have granted preferential

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several times a year. He would have to buy a sticker there. He might go into New Jersey once a year to buy chemicals. He would have to buy a sticker there. You end up penalizing a truck that is used very little and already is paying a license fee in proportion considerably more per miles traveled and per pounds hauled than anyone else, and he is going to end up paying perhaps several hundred dollars in fees to other states.

[17] The report is entitled *The Pennsylvania Axle Tax For Highway Bridge Improvement (Act 234 Of 1982): A Report On Its Collection And Economic Impact On The Pennsylvania Trucking Industry*. A copy has been lodged with the Clerk of this Court.

treatment to local trucks by adopting some form of flat highway tax. See 86-358 J.S. 7-8 & n.3. In response, numerous other states (Florida, Georgia, Maine, Nebraska, New Hampshire, New Jersey, Oklahoma, and Vermont) have adopted or activated mirror-image retaliatory taxes that apply only to trucks registered in states such as Pennsylvania that have taxes the retaliating states find objectionable. See J.S. App. K. Such retaliatory taxes have no impact on wholly intrastate operators, who are among the principal beneficiaries of flat taxes. Nevertheless, as the Pennsylvania legislative committee noted (see page 37, *supra*), retaliatory taxes can inflict severe cumulative punishment on interstate motor carriers that base their trucks in flat tax states.

The chain of events between the neighboring states of Arkansas and Oklahoma is illustrative of the compound discrimination provoked by flat highway taxes. See Brief of State of Oklahoma as Amicus Curiae, at 17-19. Following enactment of the Arkansas highway use equalization tax (5¢ per mile up to a ceiling of $175 per year), the Oklahoma Tax Commission, directed by the state legislature, reviewed the Arkansas tax and found that it placed Oklahoma-based truckers at a competitive disadvantage. The Commission therefore activated Oklahoma's retaliatory highway taxes—Okla. Stat. Ann. tit. 47 § 1120(K) (West Supp. 1985)—thereby imposing a $175 or 5¢ per mile tax on Arkansas-based trucks operating in Oklahoma. See 86-358 J.S. 20. (Oklahoma has also retaliated against Pennsylvania's axle tax.) The discrimination inherent in the Arkansas tax has thus been multiplied and redirected at trucks based in that state, exacerbating the overall burden on interstate commerce.

To compound the problem, Arkansas has responded to the retaliation by Oklahoma and others of its sister states by enacting legislation that shields Arkansas trucks from those taxes. Arkansas has determined to reimburse Arkansas-registered trucks for the highway taxes that other jurisdictions impose on them because of the dis-

criminatory tax that Arkansas itself imposes. See Ark. Stat. Ann. §§ 75-817.4, 75-817.5 (Supp. 1985) (reproduced at 86-358 J.S. App. 41a).

The unseemly economic conflict among the states provoked by Pennsylvania's axle tax and Arkansas' HUE tax—involving local preferences, retaliatory enactments, and protectionist countermeasures—is wholly incompatible with the fundamental purpose of the Commerce Clause. Furthermore, the added cost to interstate trucking that results from these new levies represents a substantial financial burden and stands as an obstacle to the free flow of commerce that the Constitution commands. "[T]his is the very kind of barrier the commerce clause was put in the fundamental law to guard against." *Nippert*, 327 U.S. at 434.

E. Existing Mileage-Related Taxes Provide A Practical, Non-Discriminatory Alternative To The Axle Tax And Marker Fee.

The evils caused by the marker fee and the axle tax are entirely avoidable, because a discriminatory tax is unnecessary to achieve the State's legitimate interest in reimbursement for the cost of maintaining its highways. Rather, a mileage-related fuel tax is a readily available alternative that can fully compensate the State, while at the same time being proportional to each truck's use of the highways and therefore entailing no discrimination against interstate commerce. Every state, including Pennsylvania, employs a mileage-related fuel tax.[18] As

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[18] See 72 Pa. Cons. Stat. Ann. §§ 2611a-2611z (Tax on Liquid Fuels); 2614.1-2614.24 (Fuel Use Tax); 2617.1-2617.26 (Motor Carriers Road Tax). See also U.S. Dep't of Transportation, Federal Highway Admin., *Highway Taxes and Fees, How They are Collected and Distributed, 1984*, at 7-9, Table MF-104. These taxes were described by the Supreme Court of Pennsylvania (J.S. App. 3a) as "related to and dependent upon a motor carrier vehicle's actual use of Pennsylvania highways," because the more miles a truck is driven in Pennsylvania, the more gallons of fuel it consumes and the greater the fuel tax it pays. See *American Trucking Associations, Inc.* v. *O'Neill*, 522 F. Supp. at 56.

Oklahoma states in its *amicus curiae* brief in this case (at 9), "Oklahoma's own successful reliance on apportioned/reciprocal truck registration fees and mileage-related motor fuel taxes shows that non-discriminatory forms of state highway taxation are readily available."

A highway use tax imposed on the basis of mileage, such as the existing Pennsylvania fuel sales and use taxes, is the fairest and most economically efficient form of highway tax, directly tying the amount of the tax to the amount of wear and tear to the highways. Especially since an increase in Pennsylvania's fuel taxes would both fully serve the State's interest in highway maintenance and completely eliminate the present discrimination against out-of-state trucks, the Pennsylvania axle tax and marker fee violate the Commerce Clause. It is evident that "the local interest" in raising tax revenues "could be promoted as well with a lesser impact on interstate activities." *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). See *Hughes* v. *Oklahoma*, 441 U.S. at 336; *Continental Trailways, Inc.* v. *Director, Div. of Motor Vehicles*, 509 A.2d 769, 778-779 (N.J. 1986), petitions for cert. filed, Nos. 86-843 and 86-879 (U.S. Nov. 24 and Nov. 26, 1986).[19]

F. The *Aero Mayflower* Line Of Cases, Upon Which The Pennsylvania Supreme Court Relied, Does Not Sustain The Axle Tax And Marker Fee.

The Pennsylvania Supreme Court did not dispute the evidence that compellingly demonstrates that the axle tax and marker fee operate to discriminate against out-of-

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[19] This is not to suggest that a highway use tax must be precisely calibrated to take account of every conceivable variable that may bear on road maintenance and repair. Some factors may be too insignificant to have an appreciable effect on highway depreciation, or too small in relation to the administrative costs of implementation, to justify their inclusion in the tax methodology. See *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 552-553 (1950) (Frankfurter, J., dissenting). But these considerations cannot justify discrimination that, as in this case, is both egregious and avoidable through practical alternatives.

state trucks and are not fairly related to the highway facilities and services provided by the State. Rather, it deemed those facts to be "inconsequential" to its Commerce Clause analysis (J.S. App. 28a). In holding that the taxes satisfied the *Complete Auto* test, the court relied exclusively on this Court's *Aero Mayflower* line of cases, which predated *Complete Auto* by several decades. Those cases do not sustain the validity of the axle tax and marker fee, however, and in any event can no longer be regarded as controlling.

1. *The Aero Mayflower Rationale.* In cases decided between 1935 and 1950, this Court upheld state highway taxes against the argument that the taxes violated the Commerce Clause because they were not graduated according to a vehicle's use of the roads in the state. See *Aero Mayflower Transit Co.* v. *Georgia Public Serv. Comm'n*, 295 U.S. 285 (1935); *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs*, 332 U.S. 495 (1947); *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542 (1950). The *Aero Mayflower* line of decisions reiterated the settled principle that a state tax may not operate to discriminate against interstate commerce. See 295 U.S. at 289; 332 U.S. at 501, 503; 339 U.S. at 544. Moreover, it did not take issue with the general proposition—recognized in cases such as *Robbins* and *Nippert*—that a facially neutral tax may in fact have a disparate impact on out-of-state taxpayers, who have a lesser presence in the state than their in-state competitors.

Nevertheless, the *Aero Mayflower* line of cases upheld flat highway taxes, rejecting the claim that they impermissibly discriminated against out-of-state carriers engaged in interstate commerce. The Court reasoned in those cases that (1) a tax precisely calibrated to the wear and tear caused to the highways by a particular vehicle would not be administratively feasible; (2) the taxes at issue were imposed for the privilege of using the highways rather than for their actual use, and out-of-state vehicles could not complain if they failed to avail themselves of the opportunity to use the roads as much

as in-state vehicles; and (3) the taxes at issue were not burdensome to interstate carriers. See 295 U.S. at 289; 332 U.S. at 503-504, 506 n.19; 339 U.S. at 544, 546-547.

2. *Subsequent Legal and Operational Changes.* The rationales employed half a century ago in deciding the *Aero Mayflower* group of cases cannot withstand analysis today. First, and most important, the Court's concern about the feasibility of administering graduated highway taxes, which was critical to its decisions upholding the flat taxes, no longer applies. See *Nippert*, 327 U.S. at 424-425, 427-428. In this heavily computerized age, all states, including Pennsylvania, utilize a variety of mileage-related highway taxes. See pages 39-40, *supra*. Whatever may have been the situation a half-century ago, it is too late in the day for the discrimination inherent in a tax such as the axle tax or marker fee to be justified by a state's reflexively asserting, or a court's uncritically accepting, a claim of administrative convenience. See *Minneapolis Star*, 460 U.S. at 587; *Halliburton Oil*, 373 U.S. at 74 n.9.

Second, the "privilege tax" rationale of the *Aero Mayflower* line of cases has no continuing validity. The Court has now recognized that a tax is no less discriminatory merely because it is labeled a "privilege" tax rather than a "use" tax. "There is no economic consequence that follows necessarily from the use of the particular words, 'privilege of doing business,' and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect." *Complete Auto*, 430 U.S. at 288. This Court's recent decisions have moved away from such empty fictions, which serve "only as a rule of draftsmanship" (*id.* at 285), and instead look to the "economic realities" (*id.* at 284) of the challenged tax. See *Westinghouse Electric*, 466 U.S. at 405; *Commonwealth Edison*, 453 U.S. at 614-617.[20]

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[20] In the *Aero Mayflower* era, Commerce Clause analysis was dominated by labels, especially in connection with the taxation of interstate transportation companies. This preoccupation produced anomalous results, including *Aero Mayflower* itself. For instance,

Third, the dramatic changes in the trucking industry that have occurred in the 50 years since the decision in *Aero Mayflower* have greatly exacerbated the burden that flat highway taxes impose upon interstate commerce. Pennsylvania's own expert acknowledged these sweeping changes in his affidavit in this case (J.A. 190):

> Many years ago, the industry was characterized by many small carriers operating within one state or one small region. The steady, long-term trend has been toward larger national carriers which operate in many states.

This description is fully substantiated by the historical evidence.

During the first third of this century, trucks were engaged principally in local rather than interstate service. See C. Taff, *Commercial Motor Transportation* 8-9 (7th ed. 1986); Rosenbaum & Lillienthal, *Motor Carrier Regulation: Federal, State and Municipal*, 26 Colum. L. Rev. 954, 972-973 & n.54 (1926). In 1927, about three-quarters of all truck trips were less than 30 miles long, and a very small proportion of trips exceeded 60 miles. National Automobile Chamber of Commerce, *Truck Facts for 1927*, at 7, 15, 21, 48. Out-of-state trucks accounted for only 2% to 10% of the total truck traffic, and many of these trucks were based near the state line and were engaged in local service. *Id.* at 7, 21-23. Moreover, most trucking operations involved individual vehicles or small fleets of trucks; in 1927 fewer than 10,000 fleets had 10 or more trucks (*id.* at 13), and in 1935 there were only 4,000 fleets of 25 trucks or more, comprising a total of

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in *Interstate Transit, Inc.* v. *Lindsey*, 283 U.S. 183, 188-189 (1931), a state tax based on motor carriers' carrying capacity was struck down as a tax on the "privilege" of engaging in interstate commerce because the legislature had not expressly tied the tax to highways. Only two years later, in *Hicklin* v. *Coney*, 290 U.S. 169, 173 (1933), a substantially identical state tax based on carrying capacity was upheld as a valid highway "use" tax because the tax statute expressly allocated the proceeds to highway maintenance.

505,000 trucks. Automobile Manufacturers Ass'n, *Motor Truck Facts* 17 (1935 ed.).

Today, in contrast, thanks in part to the vast, modern interstate highway system, many large fleets of trucks are engaged in extensive interstate service. The average length of haul has risen to 645 miles and is even longer for heavier trucks. C. Taff, *supra*, at 158. By 1984, trucks accounted for over 600 billion ton-miles of service, up from 20 billion ton-miles in 1935. See *id.* at 9, 12; *Motor Truck Facts*, *supra*, at 28. In providing such service, out-of-state trucks constitute a major share of truck traffic in a state; for example, non-Pennsylvania-based carriers compiled between 35% and 55% of the overall truck mileage in Pennsylvania (see J.A. 99, 101, 195) (while making about 85% of total axle tax payments). Furthermore, in 1985 there were 77,000 fleets of 10 or more vehicles operating 7.9 million trucks; more than 4,400 fleets had 500 or more trucks, amounting to a total of 4.6 million trucks. *Chilton's Commercial Carrier Journal* (July 1986).

Likewise, truck taxes have greatly escalated in the past 50 years. In 1927, the average truck paid $52 in state registration fees and highway taxes (exclusive of property taxes), and trucks paid a national total of $151 million in fees and taxes; in 1935 the average state charge was $81 per truck, and the total of such nationwide payments was $262 million. Automobile Manufacturers Ass'n, *Automobile Facts and Figures* 36 (1936 ed.). By 1982, the average tax had risen to $1,283 for a three-axle tractor and semitrailer and $2,829 for a five-axle tractor and semitrailer. U.S. Dep't of Transportation, Federal Highway Admin., *Road User and Property Taxes on Selected Motor Vehicles* 16 (1982). In 1984, trucks paid a total of $8.7 billion in state registration fees and highway taxes (exclusive of personal property taxes). U.S. Dep't of Transportation, Research and Special Programs Admin., *National Transportation Statistics—Annual Report, 1986*, at 29.

Thus, in the modern world of high-volume, heavily-taxed, multi-state motor carrier operations, the adverse impact on interstate commerce of non-proportional or flat highway taxes entails a level of discrimination and injury qualitatively different from that which existed during the years when *Aero Mayflower* and its progeny were decided. The same result can no longer be justified.

The nature of modern interstate trucking operations also belies the Court's assertion in *Aero Mayflower* that the disproportionate impact of a flat tax on an out-of-state trucker results from "his own refusal to enjoy [the privilege of using the state highways] as freely as he may" (295 U.S. at 289). In light of the vast distances now traveled by interstate trucks and the commercial complexity of scheduling nationwide transportation services, it simply defies reality to assert that an out-of-state company "refus[es]" to have its trucks make the same use of a state's highways as in-state trucks do. The *Aero Mayflower* reasoning founders on the fact that an interstate truck cannot be in more than one state at a time, and its route is governed by the demands of its shippers. (J.A. 57). In addition, as an increasing number of states adopt flat highway taxes, each certainly cannot justify its levy on the theory that trucks should spend more time in that state and less in others. These points, made in the dissent of Justices Frankfurter and Jackson in *Capitol Greyhound*, 339 U.S. at 557, take on added force in view of current conditions in the trucking industry, which serve to magnify the adverse cumulative impact of flat taxes.

3. *Academic Criticism of Aero Mayflower.* The *Aero Mayflower* rationale has long been subject to sharp academic criticism. Even before the Court's decision in *Aero Mayflower*, Professor Paul Kauper pointed out that flat highway taxes impose a disproportionate burden on interstate carriers, which cannot be justified "on the theory that the highways of the State are *available* for their use, and that they can be assessed on the basis of *potential* rather than actual use." Kauper, *State Taxation of*

Interstate Motor Carriers, 32 Mich. L. Rev. 171, 203, 207 n.34 (1933) (emphasis in original). Accordingly, Professor Kauper concluded that highway taxes must "take account of the actual use made of the highways" (*id.* at 211). Similarly, Professor Lockhart disapproved of the *Aero Mayflower* analysis, noting "the disproportionate tax burden which such [flat] registration fees impose upon interstate as compared with intrastate motor carriers." He pointed to the "cumulative effect" upon interstate carriers that results "from the interstate character of the journey. The same mileage in one state would result in only one tax." Lockhart, *State Tax Barriers to Interstate Trade*, 53 Harv. L. Rev. 1253, 1267, 1269 (1940).

Scholarly criticism has continued to be leveled at the *Aero Mayflower* reasoning. As Professor Ernest Brown commented on *Capitol Greyhound*:

> [The Court's] recitation of the ancient learning that a state may require, even from purely interstate operators, a fair price for the use of the highways which it constructs and maintains . . . [was] indeed the incantation of an empty formula. . . . That the states build and maintain highways—in part—and that they should be allowed a price for use can be granted without viewing *Capitol Greyhound* . . . as [the] embodiment[] of great[] wisdom or understanding. Perhaps . . . the Court [will] come to have a somewhat greater perception of the significance of a nationwide system of highway transportation.

Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 Yale L.J. 219, 232 (1957).

In fact, the modern Commerce Clause decisions of this Court are grounded in a " 'practical' analysis" (*Commonwealth Edison*, 453 U.S. at 616) and represent an "evolutionary process" (*Hughes* v. *Oklahoma*, 441 U.S. at 326) of "case-by-case [adjudication]" (*Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 457

1959)). As a result, the Court has been compelled in recent years to overturn a number of decisions that, over the course of time, were seen to depart from sound constitutional analysis.[22] "[T]his Court has prescribed the rules which determine the power of states to tax interstate traffic, and therefore should alter the rules if necessary to protect interstate commerce from obstructive barriers." *Capitol Greyhound*, 339 U.S. at 546. Here, decisions such as *Complete Auto* represent "more recent precedent and a new analysis [that] require rejection of [the *Aero Mayflower*] reasoning" (*Department of Revenue* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734, 745 (1978)). Only in this way can the Court "'establish a consistent and rational method of inquiry'" (*Commonwealth Edison*, 453 U.S. at 615) and "bring [its] analytical framework into conformity with practical realities" (*Hughes* v. *Oklahoma*, 441 U.S. at 335).

In the end, *Aero Mayflower* has become "a derelict on the waters of the law" (*Lambert* v. *California*, 355 U.S. 225, 232 (1957) (Frankfurter, J., dissenting)) and is out of harmony both with more recent Commerce Clause

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[22] See, *e.g.*, *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353, 361 (1984), overruling *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652 (1945) (Import-Export Clause); *Commonwealth Edison*, 453 U.S. at 614-617, overruling *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245 (1922) (Commerce Clause); *Western & Southern Life Ins. Co.* v. *State Bd. of Equalization*, 451 U.S. 648, 657-668 (1981), overruling *Lincoln Nat'l Life Ins. Co.* v. *Read*, 325 U.S. 673 (1945) (Equal Protection Clause); *Hughes* v. *Oklahoma*, 441 U.S. at 326-336, overruling *Geer* v. *Connecticut*, 161 U.S. 519 (1896) (Commerce Clause); *Department of Revenue* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734, 743-750 (1978), overruling *Puget Sound Stevedoring Co.* v. *State Tax Comm'n*, 302 U.S. 90 (1937), and *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947) (Commerce Clause); *Complete Auto*, 430 U.S. at 278-289, overruling *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602 (1951) (Commerce Clause); *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976), overruling *Low* v. *Austin*, 80 U.S. (13 Wall.) 29 (1872) (Import-Export Clause). See also *Northwestern States Portland Cement Co.*, 358 U.S. at 457-458.

jurisprudence and with the realities of the modern trucking industry. Flat highway taxes work to favor intrastate over interstate commerce and in-state over out-of-state trucks. That is discrimination pure and simple, and offends the central purpose of the Commerce Clause. In light of the increasing number of states that recently have enacted flat highway taxes, the time has come for the Court to so hold. Especially in the Commerce Clause area, a rule that has been rendered obsolete by subsequent legal and factual developments has no legitimate claim to continued application.

4. *The Evansville and Massachusetts Cases.* We recognize that the Court adverted to the *Aero Mayflower* line of cases in *Evansville-Vanderburgh Airport Auth. Dist.* v. *Delta Airlines, Inc.*, 405 U.S. 707, 715-717 (1972), and *Massachusetts* v. *United States*, 435 U.S. 444, 463-470 (1978). However, those decisions do not buttress the *Aero Mayflower* analysis or establish the continued vitality of its reasoning.

As explained at greater length in ATA's reply brief in the pending *Gray* case (No. 86-358 Rep. Br. 3-4), *Evansville* and *Massachusetts* did not involve a challenge to the constitutionality of flat taxes under the Commerce Clause, and they referred to *Aero Mayflower* only by way of analogy. Nor in either case was it shown that the challenged tax discriminated between in-state and out-of-state taxpayers. In fact, rather than being a discriminatory flat tax, the $1 fee in *Evansville* that was imposed on airline passengers each time they used the airport was exactly the kind of levy that, in contrast to the axle tax and marker fee, was proportional to the governmental services provided and operated to treat all users equally. The Court in *Evansville* specifically noted that "there is no showing of any inherent difference between these two classes of flights [interstate and intrastate], such that the application of the same fee to both would amount to discrimination against one or the other" (405 U.S. at 717, citing *Nippert*, *supra*). Finally, in

neither *Evansville* nor *Massachusetts* was the Court asked, as it is here, to reconsider the authority of *Aero Mayflower* in order to bring it into accord with more recent legal and factual developments.

5. *Violation of the Proportionality Requirement.* At all events, wholly apart from the issue of discrimination, the *Aero Mayflower* line of cases does not address the fourth part of the *Complete Auto* test, which requires that state taxes be fairly related to the services provided by the state. By their terms, the nondiscrimination and relatedness prongs of *Complete Auto* are distinct elements. See *Westinghouse Electric*, 466 U.S. at 399 ("'[f]airly apportioned' and 'nondiscriminatory' are not synonymous terms").

Thus, whatever their continuing relevance to the issue of discrimination, the *Aero Mayflower* cases simply do not resolve the discrete question of fair relationship. The marker fee and the axle tax are imposed to compensate the State for highway use, yet they are not proportioned to the extent of such use by the taxpayer. The Supreme Court of Pennsylvania committed fundamental error when it held (J.S. App. 29a) that the "fair relationship" requirement is satisfied if the *amount* of revenue raised by the tax is not excessive in light of the aggregate costs to the state of supporting the taxed activity. The correct inquiry is whether the *measure* of the tax is permissible. As the Court stated in *Commonwealth Edison*, 453 U.S. at 629:

> [W]hen the measure of a tax bears no relationship to the taxpayers' presence or activities in a State, a court may properly conclude under the fourth prong of the *Complete Auto Transit* test that the State is imposing an undue burden on interstate commerce.

Neither the axle tax nor the marker fee is fairly related to the extent of the presence of interstate trucks on the highways of Pennsylvania. Accordingly, both exactions run afoul of the Commerce Clause.

CONCLUSION

The judgment of the Supreme Court of Pennsylvania should be reversed.

Respectfully submitted.

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APPENDIX—NEW JERSEY RESOLUTION

PENNSYLVANIA TRUCK AXLE TAX—RETALIATORY ACTION

JOINT RESOLUTION NO. 10

SENATE JOINT RESOLUTION NO. 8019

A JOINT RESOLUTION directing the Governor of the State of New Jersey to take certain actions regarding the tax on truck axles enacted by the Commonwealth of Pennsylvania.

WHEREAS, The Commonwealth of Pennsylvania has enacted a tax on heavy trucks above 26,000 lbs. traveling within the Commonwealth of Pennsylvania in the amount of $36.00 per axle of each of those trucks; and

WHEREAS, This law went into effect on or about April 1, 1983, and is causing great hardship for the owners of trucks registered in New Jersey as well as for the owners of trucks registered in other states; and

WHEREAS, This tax is highly inequitable inasmuch as the principal burden falls upon truck owners who are not resident in Pennsylvania; and

WHEREAS, It appears that only the states of New Jersey and Oklahoma presently have legislation requiring automatic retaliatory action against the imposition of such taxes; and

WHEREAS, The State of New Jersey is proceeding under R. S. 39:3-6 to retaliate against the Commonwealth of Pennsylvania while a number of other states are contemplating similar action; and

WHEREAS, The Governors and Legislature of other states ought to adopt retaliatory measures against the Commonwealth of Pennsylvania in regard to this inequitable tax; and

WHEREAS, The Governor of this State will be in attendance at the National Governors' Conference to be held in July of this year; and

WHEREAS, It is fitting and proper that the Governor of the State urge appropriate action of a retaliatory nature against the Commonwealth of Pennsylvania for the imposition of this tax; and

WHEREAS, It is also fitting and proper that the Governor of this State request the Governor and State Legislature of the Commonwealth of Pennsylvania to reconsider the axle tax with a view to its suspension or repeal; now, therefore,

BE IT RESOLVED *by the Senate and General Assembly of the State of New Jersey:*

1. Governor Thomas H. Kean shall communicate to the Governors of other states in attendance at the National Governors' Conference in July of this year the desirability of taking retaliatory measures against the Commonwealth of Pennsylvania in regard to the recently enacted axle tax and of adopting other appropriate measures to correct the situation created by this inequitable tax.

2. Governor Thomas H. Kean shall request the Governor and Legislature of the Commonwealth of Pennsylvania to reconsider the recently enacted axle tax with a view to its suspension or repeal.

3. This joint resolution shall take effect immediately.

Approved and effective June 29, 1983.

Supreme Court, U.S.
FILED
MAR 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-257

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellants

v.

JAMES I. SCHEINER, SECRETARY OF THE DEPARTMENT OF REVENUE, *et al.*,
Appellees

On Appeal from the Supreme Court of Pennsylvania

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether Pennsylvania discriminated against interstate commerce when it changed the relative tax burden between trucks registered in Pennsylvania and those registered elsewhere by imposing an Axle Tax on all trucks using Pennsylvania highways and simultaneously reducing registration fees for trucks registered in Pennsylvania where the resulting tax distribution still weighs far more heavily on Pennsylvania registered trucks than on trucks registered out-of-state?

2. Whether flat taxes, such as Pennsylvania's Axle Tax and its predecessor Marker Fee which are fairly, but not precisely, related to the provision of services to interstate commerce, violate the Commerce Clause?

3. Whether this Court should depart from long settled precedent and declare all flat taxes, whether fairly related to State services or not, invalid under the Commerce Clause?

4. Whether, even if this Court rules that the Pennsylvania Supreme Court erred as a matter of law, it should remand the matter to that court for resolution of outstanding issues of fact and State law?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-357

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellants

v.

JAMES I. SCHEINER, SECRETARY OF THE DEPARTMENT OF REVENUE, *et al.*,
Appellees

On Appeal from the Supreme Court of Pennsylvania

BRIEF FOR THE APPELLEES

CONSTITUTIONAL PROVISION INVOLVED

The Commerce Clause of Article I, § 8 of the United States Constitution provides that Congress shall have the power:

> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

STATEMENT

Appellants challenge two Pennsylvania taxes imposed on all trucks, tractor-trailers and combinations which travel in Pennsylvania. Appellants, a trade association and interstate motor carriers which register some or all of their trucks[1] outside of Pennsylvania, claim that one

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[1] Under State law, a "motor carrier vehicle" is defined as a "truck, truck tractor or combination having a gross weight or registered

of these statutes discriminates against interstate commerce on its face. In addition, Appellants challenge both taxes on the ground that, as flat taxes, they weigh more heavily on interstate than domestic commerce and are not fairly related to services provided interstate commerce by Pennsylvania.

Both of these taxes were declared unconstitutional by the trial court. However, both were upheld by the Pennsylvania Supreme Court. This appeal followed.

1. Pennsylvania's Highway Taxes—An Overview.

Pennsylvania serves as a corridor connecting the Northeast, Midwest and Southeast interstate highways. As a result, Pennsylvania's roads are used heavily by large tractor-trailers engaged in interstate commerce. Given this heavy traffic, and its hilly terrain and frequently severe weather conditions, Pennsylvania is required to spend enormous sums of money for the construction, maintenance and repair of its roads, bridges and tunnels. J.S. App. 2a.

Pennsylvania raises funds for road related purposes primarily by levying three types of taxes or fees on the users of its highways. The first kind of tax consists of registration fees. These fees are imposed on motor vehicles that are registered in Pennsylvania.[2] 75 Pa. Cons.

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gross weight in excess of 17,000 pounds". 75 Pa. Cons. Stat. § 102. For purposes of this brief, that term will be used interchangeably with the terms "truck" and "tractor-trailer."

[2] Appellants purport to represent all those trucks not registered in Pennsylvania who are liable for the Marker Fee or Axle Tax. They describe themselves as "interstate commerce" and trucks registered in Pennsylvania as "intrastate commerce". For a variety of reasons discussed below, this characterization is seriously misleading. Pp. 35-37, *infra*. However, as we will also demonstrate, even if that characterization is accepted as accurate, Pennsylvania's tax scheme complies with the Commerce Clause.

Stat. § 1301 *et seq.* The amount of those fees depends on gross vehicle weight. 75 Pa. Cons. Stat. § 1916.

The second kind of tax is based on fuel consumption in the State and it is paid by all trucks travelling in Pennsylvania. This tax is collected in two ways. First, a fuel tax is imposed at a flat rate per gallon on all fuel sold in Pennsylvania. Pa. Stat. Ann. tit. 72 §§ 2611(d); 2614.4 (Purdon 1964 & Supp. 1986). In addition, trucks that do not travel at least 90% of their miles in Pennsylvania must keep track of all miles travelled in Pennsylvania and pay a fuel tax based on that mileage, but reduced by fuel tax actually paid at Pennsylvania pumps. Pa. Stat. Ann. tit. 72 § 2617 *et seq.* (Purdon 1964 & Supp. 1986).

Finally, beginning on August 18, 1980, Pennsylvania imposed a third kind of tax, a special user fee. The first of these was the Marker Fee. In 1983, that fee was reduced, but another user fee, the Axle Tax, was imposed. These taxes, too, are paid by all trucks using Pennsylvania highways. It is these special user taxes that are at issue in this appeal.

2. The Marker Fee.

From August 18, 1980, through March 31, 1983, Pennsylvania imposed a $25 "Marker Fee" as a charge for obtaining a road tax identification marker, a decal which out-of-state trucks are required to display in order to identify themselves as being subject to another tax—the Motor Carriers Road Tax.[3] 75 Pa. Cons. Stat. § 2101,

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[3] The Motor Carriers Road Tax Act is a fuel tax on liquid fuels purchased outside of Pennsylvania, but consumed while travelling within the State. Pa. Stat. Ann. tit. 72. § 2617 *et seq.* (Purdon 1964 & Supp. 1986). J.A. 33. The tax applies equally to vehicles registered in Pennsylvania and those registered elsewhere. Appellants do not challenge the Road Tax itself.

J.S. App. 80a-81a.[4] When it was first imposed, the $25 Marker Fee was a tax imposed for the privilege of using Pennsylvania roads. J.A. 21. Approximately $5 of the $25 charge covered the administrative costs associated with the issuance of a decal. The remainder was credited to the Motor License Fund and expended for road related purposes, primarily highway maintenance and construction. J.A. 21-22, 29-30.

Act 1980-68, which imposed the Marker Fee, also raised registration fees for all Pennsylvania-based trucks. As reflected in the chart below, in the relevant weight classes (17,000 lbs. and over), the smallest increase in registration fee was $45 and the largest was $228. In every case, the increase was more than the amount of the Marker Fee.

Class	Registered Gross or Combination Weight in Pounds	Registration Fee ($) Pre-Act 1980-68	1980-68	Increase ($)
7	17,000-21,000	192	237	45
8	21,001-26,000	216	270	54
9	26,001-30,000	252	315	63
10	30,001-33,000	300	378	78
11	33,001-36,000	324	414	90
12	36,001-40,000	342	433	96
13	40,001-44,000	360	465	105
14	44,001-48,000	384	501	117
15	48,001-52,000	420	552	132
16	52,001-56,000	444	588	144
17	56,001-60,000	501	666	165
18	60,001-64,000	552	741	189
19	64,001-68,000	576	777	201
20	68,001-73,280	606	834	228

[4] Trucks registered in Pennsylvania also are subject to the Motor Carriers Road Tax and the Marker Fee, but need not display the marker decal because their Pennsylvania license plate serves the same purpose. *Ibid.*

The trial court held that, as a matter of law, the $25 Marker Fee was imposed only on trucks not registered in Pennsylvania, and that the fee therefore discriminated on its face against interstate commerce in violation of the Commerce Clause. J.S. App. 57a. It did not reach the claim that the Marker Fee also was unconstitutional because it was a flat tax not adequately related to the services provided by the Commonwealth.

The Supreme Court of Pennsylvania reversed. First, the State Supreme Court found that the trial court had misread Pennsylvania law in determining that the $25 Marker Fee was not included in the registration fees paid by Pennsylvania-registered trucks. J.S. App. 23a. Accordingly, it found that the fee was imposed equally on both Pennsylvania and out-of-state trucks. It also found that, when viewed as a whole, Pennsylvania's tax scheme imposes substantially higher taxes on Pennsylvania-registered vehicles than on those registered elsewhere and, therefore, there was no discrimination against interstate commerce. J.S. App. 24a.

The State Supreme Court then rejected the argument that the $25 fee was not fairly related to the services provided by Pennsylvania. In so doing, it relied on a long line of this Court's decisions upholding flat taxes on interstate commerce and holding that such taxes need not be calibrated exactly to services received by individual users of State facilities, so long as they are not excessive in the aggregate. Applying those principles, the State court held that the Marker Fee did not impose an excessive burden on interstate commerce in light of the substantial highway construction and maintenance, State police services and construction bond debt services which it financed, all of which benefited interstate commerce. J.S. App. 29a.

Here, Appellants do not challenge the State Supreme Court's holding that the $25 Marker Fee was imposed on both interstate and intrastate commerce. They do

challenge the court's conclusion that the tax is reasonably related to services provided by Pennsylvania.

3. The Axle Tax.

On April 1, 1983, the Pennsylvania legislature reduced the Marker Fee from $25 to $5. At the same time, it imposed the Axle Tax. The Axle Tax is an annual tax of $36 per axle imposed on almost[5] every truck which travels in Pennsylvania and has a gross weight in excess of 26,000 pounds. 75 Pa. Cons. Stat. § 9901 *et seq.*, J.S. App. 82a-86a. Rebates are available based on actual miles travelled for any covered vehicle travelling less than 2,000 miles in Pennsylvania. 75 Pa. Cons. Stat. § 9905, J.S. App. 83a.[6] Proceeds from the tax are placed in a special account dedicated to bridge rehabilitation and replacement projects. 75 Pa. Cons. Stat. § 9908, J.S. App. 85a.

Act 234 of 1982, the same Act which imposed the Axle Tax on all trucks and lowered the Marker Fee, also lowered registration fees for trucks registered in Pennsylvania. 75 Pa. Cons. Stat. § 1916, J.S. App. 86a-87a. The reduction in registration fees was generally equal in amount to the Axle Tax imposed.[7] However, taken in

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[5] For $25, motor carriers may obtain a five-day permit allowing travel in Pennsylvania without payment of the Axle Tax. 75 Pa. Cons. Stat. § 2102(d)(2).

[6] The rebate is calculated as follows:

$$\frac{2000 - \text{actual Pennsylvania miles travelled}}{2000} \times \text{Axle Tax paid} = \text{Rebate}$$

Thus, the maximum per mile tax paid is $.09 per mile—$180 (the maximum Axle Tax) divided by 2000 miles. The average per mile rate is estimated to be much lower, approximately $.025. J.S. App. 172a.

[7] The correspondence between the registration fee and the Axle Tax imposed is not perfect. For example, trucks weighing between

combination with the increase in the registration fee which had occurred in 1980 (at the same time the $25 Marker Fee was imposed) the net effect was still an increased registration fee for most trucks registered in Pennsylvania.[8]

Since April 1983, the Axle Tax has raised over $300 million. Over the expected life of the program, Axle Tax revenues are expected to satisfy the Commonwealth's share of the funding necessary to repair and replace 979 bridges on Pennsylvania's interstate highway system—approximately $800 million. This amount will be supplemented by some $420 million in Federal aid and $40 million in local governmental expenditures. J.A. 208.

The bridge projects financed by the Axle Tax will be completed over the next five years. Of the affected bridges, 235 are located on Pennsylvania's Priority Commercial Network.[9] J.A. 228. Repair of these bridges alone will cost approximately $744 million. J.A. 228-29. Of that amount, $177 million will consist of Axle Tax revenue. *Ibid.* Approximately 70 of these 235 bridges are currently closed to heavy vehicles or closed completely. *Ibid.*

38,001 and 40,000 lbs. are required to have three axles, yet the registrations were reduced by $72 rather than the $108 Axle Tax imposed.

[8] For example, in 1980, the registration fee for a motor carrier vehicle with a gross or combination weight of 68,001-73,280 pounds increased $228. J.S. App. 7a. The 1982 decrease in the registration fee was only $144. J.S. App. 9a. Thus the total registration fee for such vehicles increased $84 after 1980. In addition, after 1982, Pennsylvania registered vehicles also paid the Axle Tax—generally $144 (4 Axles x $36) for vehicles in that weight class. J.A. 260.

[9] Pennsylvania's Priority Commercial Network consists of about 11,600 miles of roadways made up of (1) roads which carry more that 500 trucks per day and (2) connector roads of particular significance to industry. It was developed by Pennsylvania's Department of Transportation in order to identify the network of highways which is most frequently used by commercial truck traffic. J.A. 228.

The State trial court entered summary judgment for the motor carriers declaring the Axle Tax unconstitutional. The court held that the Axle Tax facially discriminated against interstate commerce because the simultaneous registration fee reductions almost always offset the Axle Tax, virtually exempting Pennsylvania trucks from the Axle Tax. J.S. App. 61a.

The Supreme Court of Pennsylvania reversed, upholding the Axle Tax. It found no discrimination against interstate commerce because, when Pennsylvania's tax scheme was viewed as a whole, intrastate commerce paid substantially higher taxes to Pennsylvania. J.S. App. 33a-34a. The court also rejected the claim that the Axle Tax is excessive or is not fairly related to the services provided by the Commonwealth. J.S. App. 34a.

4. Pennsylvania Highway Taxes—The Total Burden

In total, Pennsylvania has over a dozen highway user taxes.[10] With the exception of the registration fees, most of these taxes are facially neutral. However, when considered *in toto*, there can be no question that motor carriers registered in Pennsylvania pay a much higher price for using Pennsylvania's highways.

In this regard, Pennsylvania highway user taxes can generally be summarized as follows:

1. All Pennsylvania registered trucks pay a registration fee ranging from $39 for trucks or combinations

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[10] Pennsylvania's highway user taxes include the following: (1) truck and truck tractor registration fees; (2) trailer registration fees; (3) truck and truck tractor title fees; (4) trailer title fees; (5) registration transfer fees; (6) special hauling permit fees; (7) fuel use tax; (8) motor carriers road tax; (9) oil company franchise tax; (10) gross receipts tax (on vehicles travelling interstate); (11) liquid fuels tax; (12) farm truck registration fees; (13) special trip permit fees. J.S. App. 2a-3a; J.A. 32.

weighing 5,000 pounds or less, to $945 for those weighing up to 80,000 pounnds.[11]

2. Trucks registered outside Pennsylvania pay a $5 Marker Fee, a fee which is included with the registration fee of trucks registered in Pennsylvania.

3. All trucks weighing more than 26,000 pounds, including those registered in Pennsylvania, pay the Axle Tax, an amount usually ranging from $72 to $180.[12]

4. All trucks pay fuel usage taxes, based either on actual fuel purchases in Pennsylvania or mileage travelled in Pennsylvania.

Under this scheme, Pennsylvania trucks start out paying a substantial registration fee. In addition, they pay all the same taxes as out-of-state trucks, with the total amount of those taxes varying only with usage for otherwise similar trucks. Obviously, if Appellants are correct that Pennsylvania-registered trucks use Pennsylvania roads more than out-of-state trucks, Pennsylvania trucks also pay much higher usage taxes. Thus, under any analysis, Pennsylvania registered trucks pay a substantially higher price for the use of Pennsylvania highways than do out-of-state trucks.

The total cost of road maintenance and repair on Pennsylvania's highways from April 1, 1981 through November 30, 1982, was approximately $1.5 billion. In addition, during the same period, the Commonwealth spent some $161 million to provide State Police patrols on Commonwealth highways. J.A. 29-30. By contrast, highway taxes and fees applicable to vehicles paying the Marker Fee generated only approximately $300 million

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[11] As noted above, this fee was substantially increased for all trucks in 1981, but was then decreased in 1983.

[12] The registration fee for trucks in this weight range ranges from $243 to $945.

in revenues during that period. J.A. 38.[13] Thus, trucks generally, and interstate commerce in particular, pay only a small part of the cost of operating Pennsylvania's highways.

SUMMARY OF ARGUMENT

I. State legislatures have broad discretion to construct tax schemes which generate the revenues necessary to fund the services provided by the State. In so doing, a State need not construct a perfect system, but is merely required to develop a taxing scheme which is reasonable in setting its tax levels and in allocating the burden of taxation between interstate and local commerce. Within these limits, there is no question that a state may require interstate commerce to "pay its way."

Necessary to this discretion is a State's corollary power to alter or adjust its tax structure within reasonable limits, either to correct inequities in the original system, or to modify the system to properly reflect changes in economic circumstances. Change alone does not violate the Commerce Clause. Thus, a State may change either the absolute burden on interstate commerce or the relative burden on such commerce, so long as, taken as a whole, the State's taxing scheme does not discriminate against interstate commerce by providing local commerce with a competitive advantage.

The Axle Tax (and its predecessor, the Marker Fee) is but a single element of Pennsylvania's multi-tiered scheme of taxes and fees designed to finance an extensive highway system. When the tax burden is viewed in its

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[13] Of that amount, approximately $12 million consisted of Marker Fees paid by trucks not registered in Pennsylvania, J.A. 34; $10 million came from the Motor Carriers Road tax, J.A. 34; $80 million came from registration fees for Pennsylvania registered trucks, truck-tractors and trailers, J.A. 34-35; and $131 million came from fuel taxes. J.A. 33. The remainder was derived from various other taxes and fees. J.A. 32-38.

entirety, trucks registered in Pennsylvania clearly pay a higher price for the use of Pennsylvania highways than do trucks registered in other States. Appellants do not attempt to prove otherwise. Nor do they demonstrate, in any way, that, on an aggregate basis, trucks registered outside of Pennsylvania pay more than their fair share for the use of Pennsylvania highways. The record would not support such a conclusion. Appellants, therefore, have failed to meet their burden of demonstrating that Pennsylvania's highway tax scheme discriminates against interstate commerce.

II. This Court has repeatedly upheld flat user taxes, so long as these taxes are not excessive. This test has been reaffirmed by this Court's recent decisions, and applies to Appellants' claim, whether they characterize it as a discrimination claim or as a claim that the subject taxes are not fairly related to the services provided by this State. Both the Axle Tax and the Marker Fee are clearly valid under the "fairly related" standard, since they both generate revenues related solely to the provision and maintenance of highways for use by all vehicles.

III. There is no reason for this Court to reconsider its prior rulings that flat taxes which may affect interstate commerce are constitutional. Like the highway systems they are designed to finance, State highway taxing schemes are complex and difficult to administer. Appellants have simplistically suggested that mileage based taxes are the only constitutionally acceptable way to compensate States for the provision of roads and other highway related services. This Court has recognized, however, that mileage is only one of the relevant factors in setting compensation for road use, and thus, the taxes based solely on mileage demanded by Appellants may be no more fair or accurate in practice than the flat taxes which are at issue in this case.

This Court has recognized the State's broad discretion to design its own taxing schemes. When these taxes are otherwise constitutional, they clearly cannot be stricken down simply because another alternative exists. Likewise, the actions of other States, either in constitutionally imposing similar taxes or in unconstitutionally imposing retaliatory taxes, cannot render an otherwise constitutional tax invalid.

This Court has recognized that Congress is the appropriate body to solve the problems perceived by the Appellants in these cases. This Court's consistent previous decisions finding flat fee taxes valid are entitled to considerable respect under the doctrine of stare decisis, and should not be overturned when the solution is properly legislative in nature.

IV. If this Court determines that the judgment of the Pennsylvania Supreme Court was erroneous, it should remand this case to that Court for final disposition. There are significant issues of fact and State law to be resolved before this case can be concluded.

A. Appellants' position is based on a conception of interstate commerce which assumes that all trucks registered in Pennsylvania are intrastate in nature, and those trucks registered in other States are in interstate commerce. This distinction is not, however, necessarily accurate. To the contrary, many trucks which are registered in Pennsylvania travel through other States and are owned by firms located outside the Commonwealth. These vehicles, therefore, clearly participate in "interstate commerce" in the traditional sense. Moreover, many trucks registered outside of Pennsylvania received a benefit from the decrease in Pennsylvania's registration fees because they pay part of that fee to Pennsylvania under the International Registration Plan. The benefit from the reduction in the Pennsylvania registration fee is thus not limited to Pennsylvania registered

trucks. The degree, if any, to which interstate commerce is adversely affected by the taxes at issue in this case is a determination which involves subtle questions of fact which should be resolved by the State courts.

B. An evidentiary issue remains which should be resolved by the State courts. Even if this Court accepts the Appellants' characterization of interstate commerce, and further accepts the Appellants' argument that only mileage related taxes are constitutionally acceptable, the evidentiary basis for a finding of discrimination rests entirely on a survey which is merely a compilation of out-of-court statements of its members prepared by the Appellant trade association. The admissibility of this survey was contested in the trial court, and it was admitted over objection, but not relied upon as a basis of decision. The Pennsylvania Supreme Court did not determine the admissibility of this survey. The State court should have an opportunity to resolve this issue, especially since the evidence in question is critical to Appellants' theory of unconstitutional discrimination.

C. If this Court determines that Act 234 is unconstitutional because its provisions discriminated in effect against interstate commerce, it should remand this case to the Pennsylvania Supreme Court to determine the appropriate relief. Under Pennsylvania law, statutory provisions are presumed to be severable. The State law question which remains to be determined, then, is which of the statutory provisions should be voided: the provision imposing the Axle Tax equally on all trucks, or the provision lowering the registration fees for Pennsylvania vehicles. This is clearly an issue of legislative intent most appropriately decided by the State court.

D. If this Court chooses to overrule 70 years of consistent precedent regarding the constitutionality of flat fee taxation, it must then be determined whether its ruling is to have retroactive effect, and thus require re-

funds by Pennsylvania to the Appellants. Questions of retrospective or prospective application of judicial decisions should be resolved by considering (1) the foreseeability of the new ruling; (2) whether the purpose of the new rule would be advanced by retrospective application; and, (3) the inequities which retrospective application of the new ruling might produce. These issues are best decided by the Pennsylvania courts.

If this Court retains this retroactivity issue, it is clear that the invalidation of flat fee taxation should only have prospective application. Flat taxes have been approved by this Court consistently for over 70 years. Pennsylvania and other States have predicated enormous highway projects on their ability to collect fees under their flat tax systems, and had no reason to suspect that their revenue scheme was infirm. Especially where substantial services have been provided to the Appellants through the upgrading and improvement of numerous highways and bridges, it would be inequitable to require a refund in these circumstances.

ARGUMENT

I. PROPERLY VIEWED, PENNSYLVANIA'S AXLE TAX IS PART OF A TOTAL PENNSYLVANIA TAX SCHEME WHICH FAIRLY AND PROPERLY ALLOCATES THE COSTS OF OPERATING PENNSYLVANIA'S HIGHWAYS BETWEEN INTERSTATE AND DOMESTIC COMMERCE.

Starting with the principle that taxes which apply only to interstate commerce are facially discriminatory and therefore unconstitutional, Appellants conclude that an incremental change in a taxing scheme which results in a relative increase in taxes paid by out-of-state users of State facilities is, by itself, facial discrimination. Under their analysis, a State which discovers that interstate commerce is not paying its fair share may never reallocate the relative tax burden between interstate and

intrastate commerce. Rather, having once chosen a tax structure and a distribution of tax burdens between interstate and intrastate commerce which meets the standards established by this Court, a State is frozen into that scheme forever. This, of course, cannot be the case.

To the contrary, it is now clear that interstate commerce constitutionally may be required to "pay its way" —pay its just share of the State's expenditures for services provided. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Moreover, a State legislature has broad discretion to construct a taxation scheme which generates the required revenues in the way the legislature finds wisest, within constitutional and other limits. *See, e.g., Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526 (1958); *Tax Commissioners v. Jackson*, 283 U.S. 527, 537 (1930); *Ohio Oil Co. v. Conway*, 281 U.S. 146, 159 (1929).[14] Finally, in exercising this discretion, a legislature need not be perfect, either in setting its tax levels or in allocating the tax burden between interstate and domestic commerce. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 627-628 (1981).

It follows, of course, that a State has the right to alter its tax structure within constitutional limits. Otherwise, tax schemes would remain frozen in time and would be totally unresponsive to current economic realities. For example, over time the legislature can reexamine its initial conclusions concerning tax allocations, and determine that some groups are benefiting more than originally thought and others less. Indeed, the relative

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[14] While these cases were decided under the Fourteenth Amendment, this Court has held that:

> There is no reason to suppose that this latitude afforded the States under the Due Process Clause is somehow divested by the Commerce Clause merely because the taxed activity has some connection to interstate commerce; particularly when the tax is levied on activity conducted within the State.

Commonwealth Edison Co. v. Montana, 453 U.S. 609, 623 (1981).

benefits accruing to different groups can, in fact, change over time. In either case, rational reallocation of the tax burden would be appropriate.

The Commerce Clause does not serve to carve erroneous legislative judgments in stone forever, or to bar the legislature from changing the tax allocations to reflect changed circumstances. Yet, almost any change in a tax scheme will affect either interstate or domestic commerce and, therefore, their relative burdens. Thus, under Appellants' theory, the Commerce Clause prohibits any change which adversely affects interstate commerce.[15] To the contrary, however, in evaluating such changes, the legislature's judgment must be upheld, in the absence of a clear showing that it violates constitutional principles. *See Commonwealth Edison Co. v. Montana*, *supra*.

Clearly then, change alone cannot violate the Commerce Clause. The mere fact that, as here, a legislature has changed either the absolute burden on interstate commerce or the relative burden on such commerce in comparison with domestic commerce does not, by itself, prove a constitutional violation. Yet, Appellants here have shown no more.

This Court has never held that there is only one acceptable allocation of tax burdens between interstate and intrastate commerce. It has only held that, *taken as a whole*, a State's taxing scheme should not discriminate against interstate commerce by providing intrastate commerce with a competitive advantage. *Maryland v. Loui-*

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[15] Otherwise, Appellants would have to concede that Pennsylvania could properly have accomplished the same result in two steps as it accomplished here in one. Specifically it could have first imposed the Axle Tax on all trucks and later reduced the registration fee. The first act would have been wholly neutral; the second would have only indirectly affected interstate commerce by changing its relative share of the tax burden. We, of course, believe that done separately these changes in the tax scheme would have been legal, just as they were when done together in Act 234.

siana, 451 U.S. 725, 754 (1981). Thus, analysis under the Commerce Clause cannot be confined solely to any incremental alteration of an existing tax scheme. *See Id.* Although Appellants consider *Maryland v. Louisiana* to be controlling (App. Br. 19), they read it too narrowly. The effect of a particular levy on interstate commerce must be evaluated together with all of the provisions of the "State's tax scheme." *Ibid.*

Thus viewed, the Axle Tax does not stand alone—it is but a small part of Pennsylvania's multi-tiered scheme of taxes and fees designed to finance an extensive highway system. Under that scheme, domestic trucks clearly pay a higher price for the use of Pennsylvania highways than those registered out-of-state. Appellants make no attempt to prove otherwise, or to demonstrate in any other way that, in the aggregate out-of-state truckers pay more than their fair share for their use of Pennsylvania highways. They do not.

Indeed, viewed in any context other than that suggested by Appellants, even the changes in Pennsylvania's tax scheme have benefited interstate commerce. Specifically, while Appellants have focused only on the changes effected by Act 234 of 1982, the totality of the changes since 1980 has resulted in higher relative and absolute taxes on trucks registered in Pennsylvania. J.A. 260. As noted, in 1980, registration fees for Pennsylvania trucks were substantially increased. The decreases effected in 1982 only partially offset the 1980 increases and were accompanied, of course, by the imposition of the Axle Tax. The Axle Tax is imposed equally on all trucks and, therefore, taken by itself, is facially neutral. Accordingly, since 1980, Pennsylvania trucks have been paying more for their use of Pennsylvania highways, both absolutely and in relation to trucks registered elsewhere.

Apparently unable to demonstrate that Pennsylvania's restructured tax scheme, viewed as a whole, unfairly

allocates the tax burden between interstate and intrastate commerce, Appellants set up a strawman and then, predictably, knock it down. Specifically, Appellants correctly argue that the Axle Tax is not a "compensatory tax" within the meaning of this Court's holdings.[16]

As they note, the compensatory tax doctrine established by this Court requires that a State demonstrate that a tax applicable only to interstate commerce is offset, in fact, by a specific tax imposed only on intrastate commerce for a substantially equivalent event, and that the result is to equalize previous unequal tax burdens. App. Br. 22. Admittedly, the Axle Tax has no specific counterpart imposed only on in-state businesses. But, the compensatory tax doctrine simply has nothing to do with a State's rational reallocation of its tax burdens.[17]

In the context of a complex and multi-tiered tax scheme, such as Pennsylvania's highway user taxes, simply balancing one tax against another serves no useful purpose. Rather, as we demonstrate above, this Court has required that complex taxes be viewed as a whole, not in isolated parts. *Maryland v. Louisiana*, *supra*. As we

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[16] See *Henneford v. Silas Mason Co.*, 300 U.S. 577, 584 (1936).

[17] Although the State Supreme Court adverted to the compensatory tax theory (J.S. App. 33a-34a), Appellees never relied on that theory below. In fact, the State Supreme Court analyzed the taxing scheme in precisely the way we suggest in the text—it must be evaluated in its entirety, not by isolating one of its features. The compensatory tax doctrine was developed to place in proper perspective taxes which, although apparently discriminatory because they apply only to business originating outside the State, are valid nonetheless because they complement or compensate for a tax on comparable business originating within the State. By contrast, we deal here with taxes which apply to all motor carrier business regardless of origin. Registration fees do not compensate for these facially neutral taxes—they are part of the total tax scheme which must be evaluated to decide whether the burden on foreign commerce is "manifestly disproportionate." *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 599 (1939).

also demonstrate above, State legislatures have broad discretion to reallocate the tax burdens among the various persons and entities affected by such tax schemes. *Allied Stores of Ohio v. Bowers*, *supra*. The only relevant question in evaluating tax reallocations is whether the resulting tax scheme, when viewed as a whole, unfairly disadvantages interstate commerce. *Maryland v. Louisiana*, *supra*. Appellants here make no attempt to demonstrate that such is the case under Pennsylvania's system of highway user taxes. It is for this reason their challenge must fail.

Finally, having knocked down their own strawman, Appellants address our "rational reallocation" argument in only a summary fashion. The thrust of their argument is two fold. First, a legislature may not reallocate the tax burden unless it says it is doing so. Secondly, they appear to contend that Pennsylvania has the burden of proving that its reallocation is rational.

The first of these arguments exalts form over substance. If this Court holds that a State may not change its tax scheme to reallocate the tax burden under that scheme unless it explicitly says that it is doing so, that problem is easily remedied—State legislatures will assuredly make appropriate findings and Appellants will get little relief. More importantly, however, to impose that technical requirement on Pennsylvania retroactively would serve no useful purpose.[18] The purposes of the Act are clear on its face: to reallocate the tax burden and

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[18] Appellants' reliance on *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 405-406 (1984), for the proposition that the State is required to prove that a change in the tax mix between local and interstate commerce was necessary to rectify an imbalance is misplaced. *Westinghouse Electric* involved a facially discriminatory tax credit—one which was available only to local businesses. New York did not argue that the differential credit was necessary to make interstate commerce pay its own way, instead arguing that the effect of the credit was "slight" because New York's other taxes were high. *Id.* at 405.

to fund bridge repairs. They are also irrelevant to the real question: whether the resulting tax scheme is fair. *See Maryland v. Louisiana*, *supra*.

Likewise, it would seriously undermine the broad discretion which State legislatures have to design their tax programs to impose on Pennsylvania the burden of demonstrating that an imbalance existed in its prior tax system and that the new tax redressed that imbalance. *Commonwealth Edison Co. v. Montana*, 453 U.S. at 628-29. As this Court recognized in *Commonwealth Edison*, it is not a proper judicial function "to calculate acceptable rates or levels of taxation of activities that are conceded to be legitimate subjects of taxation." *Ibid.* This is because

> [I]t is doubtful whether any legal test could adequately reflect the numerous and competing economic, geographic, demographic, social, and political considerations that must inform a decision about an acceptable rate or level of state taxation, and yet be reasonably capable of application in the wide variety of individual cases. But even apart from the difficulty of judicial undertaking, the nature of the fact finding and judgment that would be required of the courts merely reinforces the conclusion that questions about the appropriate level of state taxes must be resolved through the political process. Under our federal system, the determination is to be made by state legislatures in the first instances and, if necessary, by Congress when particular state taxes are thought to be contrary to federal interests.

Ibid. (Footnote and citations omitted).

For these reasons, a State can not be found to have violated the Commerce Clause simply because its classifications are imperfect. Rather, in the area of economics, this Court has generally required only that a State's actions have some "reasonable basis". *See Dandridge v. Williams*, 397 U.S. 471, 486 (1970). Certainly, Penn-

sylvania's taxes on highway users, viewed as a whole, meet that standard.

In any case, States do not have the burden to justify in the first instance the manner in which they have exercised their discretion. To the contrary, the burden of proof rests squarely with those who challenge the tax plan.[19] Appellants have made no effort to satisfy their burden. Nor in our view could they mount a successful challenge. Their novel claim that a particular incremental adjustment to a complex tax scheme may be evaluated in isolation must be rejected.

II. THE COMMERCE CLAUSE DOES NOT PROHIBIT FLAT TAXES BUT REQUIRES ONLY THAT TAXES ON INTERSTATE COMMERCE BE FAIRLY RELATED TO THE SERVICES PROVIDED BY THE STATE.

In what only can be described as a dramatic departure from precedent, Appellants argue (App. Br. 28-49) that flat rate taxes on interstate motor carriers are unconstitutional because the effective tax rate is higher on out-of-state trucks which use the taxing State's roads less than do in-state trucks. Their proposal is that all truck taxes be mileage-related. While this suggestion might be an appropriate legislative solution to the trucking industry's perceived difficulties, this Court never has so restricted the States' options as a matter of constitutional imperative. In fact, as we demonstrate below, the Court never has required the degree of precision in tax-

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[19] Arguably, that burden may shift in the case of facially discriminatory taxes, those imposed only on interstate commerce. See *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984). In addition, or in the alternative, a State may have a higher standard to meet when trying to justify a facially discriminatory tax. *Ibid.* In this case, however, despite Appellants' attempts to characterize it otherwise, the Axle Tax itself is facially neutral; it is imposed equally on all trucks. Thus, it is Appellants who bear the burden of proof in challenging it.

ing schemes which Appellants advocate, and the Court repeatedly has upheld flat rate taxes on interstate motor carriers.

A. Flat Taxes On Motor Carriers May Be Fairly Related To Services Provided By The State.

The Court without exception has sustained the validity of State taxing schemes which impose flat fees on interstate motor carriers irrespective of the number of miles which they travel within the State. *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950); *Aero Mayflower Transit Co. v. Board of Railroad Commissioners*, 332 U.S. 495 (1945) (*Aero Mayflower II*); *Aero Mayflower Transit Co. v. Georgia Public Service Commission*, 295 U.S. 285 (1935) (*Aero Mayflower I*).[20] To a degree, these decisions are premised on the idea that the charge is levied not on the actual use of the roads, but upon the privilege of making such use.[21] "The fee is for the privilege for a use as extensive as the carrier wills that it shall be. There is nothing unreasonable or repressive in a burden so imposed . . . One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may." *Aero Mayflower I*, 295 U.S. at 289 (citations omitted). *Accord Aero Mayflower II*, 332 U.S. at 503-504.

The analysis was carried one step further in *Capitol Greyhound Lines, supra*, where the Court rejected a challenge to a Maryland tax based on the fair market value of vehicles used in interstate commerce. 339 U.S. at 543.

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[20] This Court has ignored mileage and approved graduated flat fees on horsepower, *Hendrick v. Maryland*, 235 U.S. 610 (1916); on carrying capacity, *Clark v. Poor*, 274 U.S. 554 (1927); on manufacturer's rated capacity, *Dixie Ohio Express Co. v. State Revenue Comm'r*, 306 U.S. 72 (1938).

[21] It must appear that the tax in fact is for reimbursement for the cost of providing public highways. Compare *Ingels v. Morf*, 300 U.S. 290 (1937), with *Morf v. Bingaman*, 298 U.S. 407 (1936).

As the Court noted, there are "innumerable factors bearing on the fairness of compensation" required from motor carriers, [*i*]*d.* at 544 and "[i]t is clearly within the discretion of the State to determine whether the compensation for the use of its highways . . . shall be determined by way of a fee payable annually or semi-annually, or by a toll based on mileage or otherwise.'" *Id.* at 544-545 (footnote omitted), *quoting Kane v. New Jersey*, 242 U.S. 160, 168 (1916).

The Court explicitly rejected the argument that the Maryland tax was infirm because it fell "short of achieving uniformity among carriers in relation to road use." *Id.* at 546. The Court recognized that Maryland, like Pennsylvania, imposes a mileage tax on motor carriers in addition to flat fees. When the entire taxing scheme is considered "the total charge as among carriers does vary substantially with the mileage traveled." *Id.* at 546. But more importantly, the Court recognized mileage was not a talisman for curing inequities in State taxing schemes. "Complete fairness would require that a state tax formula vary with every factor affecting appropriate compensation for road use." *Id.* at 546. The insurmountable difficulties with constructing such a complex formula and the administrative burdens attendant to enforcing such a scheme persuaded the Court against requiring that level of precision. *Id.* at 546-547.

The question ultimately is whether the total amount of the taxes "is shown to be in excess of fair compensation for the privilege of using state roads." *Id.* at 547. Carriers will succeed in challenging State road taxes only if they prove that "the total [State] taxes are out of line with fair compensation due to [the State]." *Ibid. See also Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183, 186 (1931) (tax "sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways . . . .").

Lest there be some thought that this analysis is from a bygone era, it is instructive that more recently in *Evansville-Vanderburg Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), this Court unequivocably reaffirmed this line of precedent. The case involved a flat one dollar fee imposed on each passenger enplaning any commercial aircraft at Evansville Airport. The Court, in upholding the fee, held that "A state may impose a flat fee for the privilege of using its roads, without regard to the actual use by particular vehicles, so long as the fee is not excessive." *Id.* at 715. In so holding, the Court relied on *Aero Mayflower* I and II, *supra*, and *Capitol Greyhound, supra.* The Court explicitly reaffirmed its *Evansville* holding in *Massachusetts v. United States*, 435 U.S. 444 (1977) (involving a flat fee registration tax on aircraft).[22]

Appellants' claim must meet this test regardless of whether they characterize it as a discrimination claim or a claim that the taxes are not fairly related to the services provided by the State. Once Appellants concede, as they must, that Pennsylvania may impose a tax on their activity in Pennsylvania and that the taxes at issue are imposed even-handedly on interstate and intrastate commerce, the only remaining foundation for their discrimination theory is a claim that the tax burden borne by the out-of-state trucks is excessive. This is, of course, merely a variant of Appellants' assertion that these taxes do not satisfy the "fairly related" requirement. Their discrimination claim, therefore, collapses into that claim and must meet the same test. *Commonwealth Edison Co. v. Montana, supra*, 453 U.S. at 620.

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[22] *See also, ATA v. Goldstein*, 301 Maryland 372, 483 A.2d 47 (1984) (upholding a flat highway user charge against Commerce Clause attack). In *Goldstein*, the Maryland Supreme Court rejected the taxpayer's argument that the *Complete Auto Transit* case overruled the long line of the flat fee cases.

B. The Rationale Of The Flat Tax Cases Has Not Been Modified.

Apparently conceding that Pennsylvania's truck taxes satisfy the rules announced in *Capitol Greyhound Lines* and the *Aero Mayflower* cases, Appellants argue that those cases have been undercut by *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977). But what Appellants fail to appreciate is that *Complete Auto* purported to alter only the distinction between analyzing taxes labelled as "privilege" taxes and those labelled otherwise. The Court held no more than that the tests it had previously developed for analyzing non-privilege taxes should be applied regardless of the label assigned by the State. *Id.* at 278-279, 288-289. This much is evident, not only from the Court's discussion, but also from its citation to two flat fee cases, *Ingels v. Morf*, 300 U.S. 290 (1937) and *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939). *Id.* at 278, n.6.

Appellants mistakenly rely (App. Br. 31) on *Commonwealth Edison, supra*, for the proposition that all taxes must be directly proportional to the taxpayer's contact with the State. The Court, instead, was careful to distinguish between general revenue taxes (like those at issue in *Commonwealth Edison*) and "user fees" (like those challenged here). 453 U.S. at 621-622 and n. 12. With respect to user fees, which are dedicated to pay for transportation facilities, the Court referred to flat fee cases such as *Evansville-Vandenburgh Airport Authority Dist. v. Delta Airlines*, 405 U.S. 707 (1972); *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939); and *Ingels v. Morf*, 300 U.S. 290 (1937), as providing the appropriate rules. User fees are not entirely analogous to true taxes and, as we have detailed above, the appropriate test requires that the legislature's choice of a user fee structure be approved if the fees are not "manifestly disproportionate" to the facilities made available to interstate commerce. *Commonwealth Edison, supra*, 453 U.S. at

622, n.12, *quoting Clark v. Paul Gray, Inc.*, *supra*, 300 U.S. at 599.

Cases such as *Nippert v. Richmond*, 327 U.S. 416 (1946); *Best & Co. v. Maxwell*, 311 U.S. 354 (1940); *Sprout v. South Bend*, 277 U.S. 163 (1928); and, *Robbins v. Shelby County Taxing Dist.*, 120 U.S. 489 (1887), all involved general revenue flat taxes.[23] Their vice was that the fees were not used to pay for facilities available and necessary for the movement of interstate commerce and they were not proportioned in any fashion based on the extent of contact between the taxing jurisdiction and foreign commerce. In fact, the Court in *Sprout* made it clear that the analysis would have been different if the fee revenue had been "applied to the construction or maintenance of the city streets." 277 U.S. at 170. Properly viewed, these cases are entirely consistent with the *Aero Mayflower* line of cases and with the distinctions drawn in *Commonwealth Edison*, *supra*.[24]

Appellants contend (App. Br. 49) nevertheless that flat taxes necessarily violate the fourth requirement identified in *Complete Auto*—that the tax must fairly relate to the services provided by the State. *Id.* at 278. But the "fair relation" requirement sounds remarkably like the test employed in the flat fee cases. The fee may not be excessive in relation to the privilege which it purchases. *See Evansville Airport v. Delta Airlines*, *supra*, 405 U.S. at 715; *Capitol Greyhound Lines v. Brice*,

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[23] To a degree, these cases also appear to rely on the principle, now overruled by *Complete Auto*, that local governments may not lay taxes on the right of interstate merchants to "do business" within their jurisdiction.

[24] The Court itself has observed "that the rule of *Robbins v. Shelby County Taxing District*, *supra*, has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate. . . ." *McGoldrick v. Berwind-White Co.*, 309 U.S. 33, 57 (1940).

supra, 339 U.S. at 545; *Aero Mayflower II*, *supra*, 332 U.S. at 504. The Constitution requires fair relation, not mathematical precision.

It is clear, therefore, that State taxation taking the form of flat fees for the use of public facilities has never been questioned as long as the fee is imposed equally on all users, and is a fair approximation of use or privilege of use, not excessive in comparison with the government benefit conferred. Neither is this constitutional doctrine unusual since these charges partake rather of the nature of a rent charged by the State based upon its proprietary interest in the public property rather than of a tax as that term is thought of in a technical sense.[25]

C. The Axle Tax Is Fairly Related To The Services Provided By The State.

In order to invalidate this type of State tax, Appellants must prove that the Axle Tax of $72 to $180 is excessive. Such levies have been upheld unless the amount is shown to be in excess of fair compensation for benefit of using State facilities. *Capitol Greyhound Lines*, *supra*. Moreover, the burden of asserting the requisite manifest disproportion rests squarely on anyone challenging the validity of the tax. *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939); *Capitol Greyhound Lines*, *supra*.

Here, it is clear that the Axle Tax is not excessive in relation to the services it finances—indeed, Axle Tax revenues are paid into a dedicated fund used for bridge projects directly benefiting the vehicles taxed. Heavy vehicles—those subject to the Axle Tax—are a major cause of the deterioration which has necessitated the bridge improvement and replacement program. That

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[25] Chapter 12, Exactions for the Use of Public Facilities and Services, Federal Limitations on State and Local Taxation. Paul J. Hartman, Professor of Law Emeritus at Vanderbilt University, Lawyers Cooperative Publishing Co., 1981, p. 665-666.

weight is a major factor in wear and tear on the highway cannot seriously be questioned. In fact, this Court has so held. In *Hicklin v. Coney*, 290 U.S. 169 (1933), the Court sustained a special user fee based on the carrying capacity, size and weight of trucks and specifically noted that carrying capacity—the size and weight of trucks—unquestionably had a direct relation to the wear and hazards of the highway. *Id.* at 173.

In-state registered trucks, as well as out-of-state registered trucks, need to use the State, county and municipal roads on which the bridges in question are located. These vehicles must use these routes to reach their destinations and to gain access to the federal interstate highways. Absent safe, usable bridges on these routes, the vehicles would be unable to pick-up, transport and deliver goods. J.A. 160, 184-187. This being the case, it is only fair that these vehicles be required to pay for the bridge projects which are essential to their continued operation in interstate commerce.

Most trucks, whether registered in-state or out-of-state, are not assessed more than $180; yet, even the $180 charge is well within the constant dollar amount of fees previously held valid by the Court. The $25 (1935 dollars) fee approved in *Aero Mayflower I*, *supra*, equates with $186.03 in 1983 dollars.[26] Yet, in 1935, the Georgia truck weight limit was only 12,500 lbs.[27] compared to Pennsylvania's current 80,000 lbs. In short, the approved fee in 1935 was for more money and substantially less privilege. Similarly, in 1950 the Capitol Greyhound company challenged Maryland's levies of $505.17, $580.00 and $372.55[28]; an equivalent 1983 flat

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[26] The Consumer Price Index, (1967 = 100), was 40.1 in 1935 and 298.4 in 1983. U.S. Department of Labor Handbook of Labor Statistics, 1975, Reference Edition and Consumer Price Index, U.S. City Average 1975-1980.

[27] Ga. L. 1931 (Ex. Sess.), p. 114.

[28] *Capitol Greyhound Lines v. Brice*, *supra*, 339 U.S. at 546.

rate charge would have been $2,090.00, $2,400.00, and $1,542.00.[29]

A review of the record indicates that the trucking industry paid approximately 20% of the Commonwealth's expenditures for road maintenance and repair during the period April 1, 1981 through March 31, 1982. (Appendix 1a to this brief.) By contrast, heavy vehicles occasion the vast majority of road repair costs and cause higher road construction costs than would be the case if only cars used roads. J.A. 218-220. Although the Appellants contend that wear and tear on the highway system is only a function of miles driven, it is beyond credible dispute that carrying capacity, the size and weight of trucks unquestionably has a direct relation to the wear and hazards of the highway. *Hicklin v. Coney*, *supra*, 290 U.S. at 173.[30]

The Axle Tax is weight-related since it is a graduated charge relating to the number of the truck axles. All States have maximum load requirements. These requirements generally provide, that as vehicle weight increases, so does the number of axles. Therefore, the Axle Tax does vary with weight, the more axles on the vehicle, the more it pays. In addition, the Axle Tax also varies with mileage over the first 2,000 miles traveled in Pennsylvania over the course of a year. This prevents a situation in which a full tax is imposed on a vehicle having only *de minimis* contact with the State. Thus, not only is the Axle Tax by itself fairly related to the services provided vehicles using Pennsylvania highways—it is also part of a larger tax scheme which undercharges heavy vehicles for the use of the roads.

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[29] The Consumer Price Index, in 1950 was 72.1; in 1983 the Consumer Price Index was 298.4, respectively.

[30] This Court has approved various non-mileage related highway user fees. See, *supra*, pp. 22-23, note 20 and related text.

D. The Market Fee Was Fairly Related To The Services Provided By The State.

The burden of asserting the requisite manifest disproportion clearly rests on the person challenging the validity of the tax. *Capitol Greyhound Lines v. Brice*, *supra*, 339 U.C. at 548; *Clark v. Paul Gray, Inc.*, *supra*, 306 U.S. at 599. But Appellants have made no attempt to establish that the $25 Marker Fee is excessive in relation to the benefit provided by the Commonwealth of Pennsylvania. In fact, the record directly refutes any such submission.

The Marker Fee is levied for the privilege of using State roads. J.A. 21. In order to extend the privilege of traversing its roads both to interstate and local traffic, Pennsylvania expended approximately $1.5 *billion* from April 1, 1981 through November 30, 1982 for highway construction and maintenance, State police protection and debt service. J.A. 29-30. Of this sum, motor carrier user fees received from vehicles subject to the Marker Fee totalled only $304 million (J.A. 38), and the Marker Fee itself yielded only about $12.5 million. J.A. 34. Although light weight vehicles used these roads too, it was heavy trucks such as those subject to the Marker Fee which necessitated significantly higher construction and maintenance costs. J.A. 30; *see also* J.A. 210-214. The record hardly demonstrates that the Marker Fee imposes a grossly disproportionate burden on interstate commerce. In fact, interstate carriers appear to have received a bargain.

It is interesting to note that the $25 fee is exactly the same amount upheld in *Aero Mayflower Transit Co. v. Georgia*, *supra*. In *Aero Mayflower* the charge was imposed for trucks with a weight limit of only 12,500 lbs. In 1981 and 1982, Pennsylvania imposed a similar $25 fee for trucks weighing 17,000 lbs. to 80,000 lbs. In terms of constant dollars, Pennsylvania's $25 charge is miniscule. For this same $25 fee, Appellants are re-

ceiving substantially more privilege than was granted in the Georgia case. As a result, it is clear that the Marker Fee is not unreasonable in amount and, therefore, satisfies the *Aero Mayflower* line of cases.

III. THERE IS NO REASON FOR THIS COURT TO RECONSIDER ITS PRIOR RULINGS THAT FLAT TAXES ON INTERSTATE COMMERCE ARE CONSTITUTIONAL.

Appellants suggest a number of reasons why this Court should reconsider prior rulings that flat taxes are constitutional. Those arguments are without basis.

Primarily, Appellants argue that this Court's decisions upholding flat taxes were based on assumptions which are no longer realistic. For example, they claim that the Court need no longer be concerned about the feasibility of administering graduated highway taxes because modern computers allow all States to utilize a variety of mileage-related highway taxes. App. Br. 42. This argument, however, misses the point in several respects.

As we have noted, and this Court has recognized, mileage is not the only "factor relevant in considering the fairness of compensation for road use." *Capitol Greyhound Lines v. Brice*, *supra*, 339 U.S. at 542. Rather, factors such as weight and size are equally important. *Ibid.* Thus, Appellants' contention that flat taxes must be discarded because records of mileage can now be accurately tracked on computers ignores that mileage, by itself, is not an accurate measure of road use or wear.

Secondly, Appellants' glib assertion that computers have eliminated all administrative problems is unsupportable. Computers can do nothing to ensure that the data which they process is accurate: garbage in still means garbage out. Enforcement of the requirement that mileage be accurately reported is still a complex and expensive endeavor. *See* J.A. 221-225. Thus, it is some-

what premature to argue that usage taxes based on mileage are so easy to administer that this Court should have no concerns about requiring such taxes. Certainly nothing in the record supports this contention.

Appellants also argue that existing mileage-related taxes provides a practical, nondiscriminatory alternative to the Axle Tax and Marker Fee. There is no factual basis for this argument in the record [31] and it is, in any case, irrelevant. The only support which Appellants do submit for this argument is the non-record experience in three other States. There is no evidence, however, that those States share Pennsylvania's terrain or weather problems, let alone its heavy volume of interstate travel.

Moreover, this Court has repeatedly held that States have broad discretion to design their own tax schemes. *Allied Stores of Ohio v. Bowers, supra*; *Commonwealth Edison Co. v. Montana, supra.* Certainly, a tax which is otherwise constitutional cannot be stricken simply because another alternative exists.

Finally, Appellants contend that Pennsylvania's flat taxes should be stricken because the adoption of such taxes by other States would impose a crippling cumulative burden on interstate motor carriers and has already provoked economic retaliation by other States. These arguments too are without factual foundation and are irrelevant. While citing hypothetical horror stories regarding cumulative burden, no such burdens are demonstrated. In any case, problems related to retaliation and cumulative burden are not limited to flat taxes. They can result from any kind of tax. A State tax which is

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[31] Indeed, the evidence raises serious questions about Pennsylvania's ability to raise additional funds by raising existing taxes. In 1980, when Pennsylvania raised its registration fee, the number of trucks registered in Pennsylvania fell over forty percent. Thus, apparently, motor carriers have some ability to change their mode of operations to minimize State taxes. J.A. 188-192.

otherwise constitutional cannot become unconstitutional because of the actions of other States.

To the contrary, as Pennsylvania has already argued before this Court (as *amicus*), it is retaliatory taxes which are unconstitutional. *Arkansas v. Oklahoma*, No. 95 Orig. (O.T. 1984). Such taxes violate the Commerce Clause in at least two respects. First, because they are imposed only on out-of-state trucks, they clearly discriminate against interstate commerce.[32] In addition, they fail the "fair relationship" test since they are not even arguably related to the costs of providing services. Rather, their imposition, and generally their amount, depend solely upon the amount of a tax imposed by another State. *See, e.g.*, 47 Okla. St. Ann. § 22.5j(K) (Supp. 1983).

As this Court has recognized, Congress is the appropriate body to solve those problems which Appellants purport to submit to this Court. "[I]f a new rule prohibiting taxes [on flat rates] . . . is to be declared, we think Congress should do it." *Capitol Greyhound Lines, Inc. v. Brice, supra*, 330 U.S. at 547 (footnote omitted). "Under our federal system, the determination [of tax measures] is made by state legislatures in the first instance and, if necessary, by Congress, when particular state taxes are thought to be contrary to federal interests." *Commonwealth Edison Co. v. Montana, supra*, 453 U.S. at 628.

Flat fees imposed by States on interstate motor carriers, including vehicle registration fees, have a long history. If a change is to be made, it should be by Congress.

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[32] While this Court has held that retaliatory taxes do not violate the Equal Protection Clause, it has explicitly left open the possibility that such taxes are unconstitutional under the Commerce Clause. *Western and Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 671 (1981).

As Justice Black stated in his famous dissent:

> Since the present litigation has developed that no such unfair burdens have been imposed upon the Appellant's interstate business, Appellant can only be exempted from payment of this tax by the application of a regulatory rule or law which condemns all such state taxes—whether fair or unfair. If such a rule or law is to be promulgated, it would seem that under our constitutional division of governmental powers, such a regulatory policy should be considered and determined by Congress under its exclusive grant.
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> • • • •
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> With the wisdom of such fiscal policy of a state, we are not concerned. The interest of interstate commerce will best be fostered, preserved, and protected—in the absence of direct regulation by Congress—by leaving those engaged in the various states subject to the ordinary and non-discriminatory taxes of the states from which they receive governmental protections.

J. D. Adams Manufacturing Company, 304 U.S. 307, 332-333 (1933) (Black, J., dissenting).

Prior decisions of this Court are entitled to considerable "respect" as reflected in the doctrine of *stare decisis*. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 419-420 (1983). A consistently applied rule of law can be overruled only if it is clearly demonstrated that it was plainly incorrect and it has engendered significant problems which can be corrected only if the rule is changed. *See Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272-273 (1980); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 404-405 (1970). As we have discussed, Appellants have failed to demonstrate either that the flat fee cases are wrong or that they have created far-reaching difficulties. Moreover, interstate commerce problems are particularly within the expertise and power of Congress to solve. This

Court should decline Appellants' invitation to reverse the long line of flat fee cases.

IV. IF THIS COURT RULES THAT THE PENNSYLVANIA SUPREME COURT ERRED AS A MATTER OF LAW, IT SHOULD REMAND THE MATTER TO THAT COURT FOR FINAL DISPOSITION.

Even if this Court rules that the Pennsylvania Supreme Court erroneously entered judgment in favor of the Commonwealth, it should remand this case to that Court for final disposition. This is because there are issues of fact and State law which must be resolved by State courts before final disposition of this case.

A. Unresolved Factual And Evidentiary Issues Preclude Final Judgment In Favor Of Appellants.

1. It is not at all clear, as a factual matter, that the State in which a truck is registered has anything to do with the nature of the commerce in which it is engaged for purposes of the Commerce Clause. The vast majority of heavy trucks registered in Pennsylvania travel a substantial portion of their mileage outside of Pennsylvania, and are owned by firms engaged in business outside as well as in the Commonwealth. J.A. 192. Those firms are generally free to choose the State in which they will register their trucks. J.A. 188-192. Those trucks, therefore, clearly participate in "interstate commerce" in the traditional sense.

Moreover, many trucks which are registered outside of Pennsylvania receive the benefit of the decrease of the registration fees which accompanied the imposition of the Axle Tax because their State of registration participates in the Interstate Registration Plan. Under that plan, they pay a portion of Pennsylvania's registration fee, based upon that proportion of their total miles of travel which are travelled in Pennsylvania. J.A. 38-40. Accordingly, when Pennsylvania's registration fee is decreased, their total obligation for registration fees falls.

Properly viewed, then, many interstate truckers benefited from Act 234 whether or not they were registered in Pennsylvania. Thus, the degree to which "interstate commerce" as a whole was adversely affected by the Axle Tax and Marker Fee involves subtle questions of fact which have not yet been resolved. These issues are properly left for the State courts.

2. If the Court agrees with Appellants' argument that interstate commerce includes all trucks not registered in Pennsylvania which are liable for the Marker Fee or Axle Tax, an evidentiary issue still remains which should be resolved by the State courts. Specifically, Appellants' argument that the Axle Tax and Marker Fee discriminate against interstate commerce because they bear more heavily on a per mile basis on trucks not registered in Pennsylvania is based almost entirely on a survey which was a compilation of out-of-court statements collected by the Appellant trade association from its members. While the survey was admitted by the trial court over objection, it was not relied on by that Court in reaching its decision. Nor was its admissibility, which Appellees contested, considered by the Pennsylvania Supreme Court.

Undisputed testimony demonstrated that the survey had not been conducted in accordance with professional standards and had no other indicia of reliability. J.A. 82-84. To the contrary, the survey included no sample, representative or otherwise, but rather, included information supplied by whoever happened to respond. The person who designed and conducted the survey was neither an expert nor even neutral with respect to the subject matter. The design, questionnaires, and interviewing techniques all failed to meet professional standards. The supervisor of the survey, the interviewers and respondents all knew both the purpose of the survey and of the litigation in which it was to be used. *Ibid.* Thus, the survey would not meet the test for admissibility under Rule 803 of the Federal Rules of Evidence and would be

equally inadmissible in State court. Certainly, admissibility in State court should be resolved by the highest State court, especially when that issue is, under Appellants' theory, critical to a decision on the constitutionality of a State statute.

3. While Appellants purport to find other support in the record for their allegations that a typical truck registered in Pennsylvania drives more miles on Pennsylvania's highways than trucks registered in other states (App. Br. 33-34), the evidence is far from conclusive. For this proposition, Appellants cite an informal survey done by Pennsylvania's Department of Transportation in 1979. App. Br. 33-34. That survey, however, predates the initial increase in registration fees which caused many trucks to register outside Pennsylvania. Thus, when it was taken, in 1979, a much higher percentage of trucks operating in Pennsylvania were registered in Pennsylvania than in 1981, the year from which Appellants take their truck registration figures. *See.* J.A. 74, 89, 104. Thus, Appellants' comparison of the percentage of trucks registered in Pennsylvania in 1981 (allegedly 25%) to the percentage of miles driven on Pennsylvania's highways by heavy trucks registered in Pennsylvania in 1979 (allegedly 65%) is wholly invalid.

In any case, the 1979 survey was based on a wholly inadequate sample and, like Appellants' own survey, was the subject of various objections in the Courts below. J.A. 47, 84. Its admissibility, like that of Appellants' survey, should be determined by the State Courts.

Appellants also note that Pennsylvania registered trucks drive a higher percentage of their total miles in Pennsylvania than those registered out-of-state. That comparison says nothing, however, about actual miles travelled. To the contrary, the exhibit referred to by Appellants demonstrates that Pennsylvania registered trucks travelled fewer than thirty percent of all miles of travel in Pennsylvania (.651 billion miles travelled by

trucks registered in Pennsylvania/2.212 billion total Pennsylvania miles). J.A. 169-171. This percentage fairly relates to number of vehicles, 131,000, registered in Pennsylvania in 1981 as opposed to those registered elsewhere which travelled in Pennsylvania, 399,000. J.A. 89.

We do not contend that these numbers are any more accurate than those suggested by Appellants in their brief. To the contrary, they demonstrate again that the evidence is far from conclusive. Clearly, the discrepancies and the related evidentiary questions should be resolved by the State Courts. Accordingly, even if this Court finds that flat taxes must be precise under the Commerce Clause, this matter should be remanded to the Pennsylvania Supreme Court to determine whether, in fact, the Axle Tax and Marker Fee bear more heavily on interstate commerce.[33]

B. The Axle Tax Involves A Severability Question Properly Addressed By The State Court In The First Instance.

In addition, a decision that Act 234 of 1982 is unconstitutional because it effectively relieves Pennsylvania registered trucks of the burden of the Axle Tax by simultaneously lowering their registration fees raises an issue of statutory construction which should be resolved by Pennsylvania courts. Specifically, under State law, statutory provisions are presumed to be severable. 1 Pa. C.S.A. § 1925. Thus, the question arises as to which

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[33] On the other hand, if this Court agrees with us that the relevant inquiry, under *Maryland v. Louisiana*, is whether a State's taxing scheme taken as a whole discriminates against interstate commerce, the survey is irrelevant. Rather, the survey purports to evaluate only the burden of the Marker Fee viewed in isolation. Indeed, it was neither offered nor admitted in the Axle Tax litigation. Thus, Appellants cannot rely on that survey with regard to the Axle Tax or any argument that Pennsylvania highway user taxes, viewed as a whole, discriminate against interstate commerce.

provision is unconstitutional and must be voided: the provision imposing the Axle Tax equally on all heavy vehicles or the provision which lowered the registration fee, supposedly exempting domestic commerce from the effect of the Axle Tax. The issue is clearly one of legislative intent which should be decided by the Pennsylvania courts.[34] Accordingly, even if this Court finds that the Axle Tax improperly discriminates against interstate commerce by exempting domestic commerce from its effect, this matter should be remanded to the Pennsylvania Supreme Court to determine the appropriate remedy.

C. The State Court Should Decide Whether A New Rule Against Flat Fees Should Be Applied Prospectively or Retroactively.

Finally, if the Court determines that flat rate fees on motor carriers are no longer permissible and that the *Aero Mayflower* line of cases must be overruled, it by no means follows that this rule must be applied retroactively to require refunds by Pennsylvania which will amount to as much as $400 million. "[T]he Constitution neither prohibits nor requires retrospective effect." *Linkletter v. Walker*, 381 U.S. 618, 629 (1965). Quite simply, "the federal constitution has no voice upon the subject." *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932).

Questions of retrospective versus prospective application are resolved by considering the forseeability of the

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[34] Of course, we urge that if this issue is reached, here or in the State courts, the provision lowering the registration fee should be voided. First, as noted, the Axle Tax was imposed equally on all trucks and is, therefore, neutral. If there is a discrimination, it is in the lowering of the registration fee. Second, the issue is one of legislative intent and, certainly, it cannot credibly be argued that Pennsylvania's legislature would want an interpretation of this statute which left a major bridge renovation project without funding.

new rule, whether the purpose of the new rule would be advanced by retrospective application, and the inequalities which retroactive application may produce. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971). Because this case comes to the Court from a State court and because there may be matters not of record which bear on the question of retrospective application, the best course would be to remand the case to the State courts for resolution. This result is particularly appropriate here both because it may influence, or be influenced by, the severability question discussed earlier and because the question is not a constitutional one.

Should the Court choose to consider the issue, it is plain that retroactive application would be inappropriate here. Non-mileage related flat fees have been approved by this Court no less than 12 times between 1916 and 1978.[35] States like Pennsylvania, which have predicated enormous highway projects on their ability to collect fees like those approved in prior cases, had no reason to suspect that their revenue scheme was infirm.

If the purpose of prohibiting flat taxes is to foster the free flow of commerce, it is difficult to see how a refund of tax collections will further that purpose. Commerce apparently continued to flow over Pennsylvania roads while these taxes were in force and refunds will do nothing to retroactively free Appellants from whatever constraints they have operated under.

The inequity of applying an adverse decision retroactively are staggering. The Axle Tax, which represents the lion's share of the revenues at issue here, was enacted to pay for a billion dollar bridge repair and replacement program. This program is substantially under way,

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[35] This list includes the *Aero Mayflower, supra*, line of cases, which were reaffirmed in *Evansville, supra*, and *Massachusetts v. U.S., supra*, and also includes the graduated user fee cases, beginning with *Hendrick v. Maryland, supra*. *See*, p. 22.

expending $55,000,000-$75,000,000 annually. This has already resulted in the upgrading of numerous bridges, which need repair to accommodate the heavy loads carried by Appellants and others in their business. To refund these enormous sums would strain the treasury beyond its limits, while Appellants would continue to reap the benefits of an improved highway system. The balance tilts heavily in favor of prospective application only.[36]

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[36] In stipulations filed in the trial court, Appellees agreed to a procedure for expedited refunds should Appellants "prevail upon the merits." J.A. 111, 151. The stipulation was essentially procedural in nature in relieving Appellants from the obligation to file numerous individual requests for refunds. *See* Pa. Stat. Ann. tit. 72, § 503 (Purdon 1949 & Supp. 1986). Rather than promising refunds irrespective of Appellants' entitlement under State law, the stipulations merely were reflective of a State statute which makes refunds available if the law imposing the tax is declared unconstitutional. Pa. Stat. Ann. tit. 72, § 503 (Purdon 1949 & Supp. 1986); *see* J.A. 111-112, 151. This is reinforced by the specific reservation in the stipulations of all defenses. J.A. 113, 152. The question of retrospective versus prospective application, in our view, is tied inextricably to the merits of the case and the stipulation was not intended to preclude the result urged in the text. In any event, the question whether the refund statute requires a refund in all cases is a matter of State law properly addressed by the State courts in the first instance.

CONCLUSION

The judgment of the Supreme Court of Pennsylvania should be affirmed, or, alternatively, this case should be remanded to the Supreme Court of Pennsylvania for further proceedings as are appropriate.

Respectfully submitted,

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APPENDIX

Compilation of Cost and Benefits 4/1/81-3/31/82

Trucking Costs

Charges Imposed On Pa. Registered Trucks Permits, Titles, Registration Fees

(J/A, P. 35, ¶ 80)	Special Hauling Permits	4.8	
(J/A, P. 35-36, ¶ 82, 84)	Title Fees	5.8	
	Registration Fees	48.5	
(J/A, P. 36, ¶ 86 & 88)	.5 Transfer Fees		
(J/A, P. 34, ¶ 72)	14.3 Single Trucks		
(J/A, P. 34, ¶ 74)	26.7 Truck Tractors		
(J/A, P. 35, ¶ 77)	7.0 Trailers		
	Total		59.1

Charges Imposed on Non Pa. Registered Trucks

(J/A, P. 35, ¶ 76)	IRP Registration Fees	5.0	
(J/A, P. 34, ¶ 70)	Marker Fee	10.8	
	Total		15.8

Charges Imposed On Both

(J/A, P. 33, ¶ 67)	Fuel Use and Liquid Fuels	79.1	
(J/A, P. 34, ¶ 70)	Motor Carrier Road Tax	5.8	
(J/A, P. 37, ¶ 92)	Gross Receipts Tax	.3	
(J/A, P. 37, ¶ 97)	Oil Company Franchise Tax	22.5	
	Total		107.7
	TOTAL HIGHWAY USER FEES		182.6

Motor License Fund Expenditures

	Highway Maintenance	525.0	
(J/A, P. 29, ¶ 47)	Highway Construction	79.7	
	State Police	104.2	
	Debt Service—Principal	63.6	
	Debt Service—Interest	105.4	
TOTAL MOTOR LICENSE FUND EXPENDITURES			877.9

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* Marker fee revenues were generated solely from trucks registered out of state. $25 marker fee was deemed paid by Pa. registered trucks as part of their $45-228 increases in registration fees.

Supreme Court, U.S.
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No. 86-357

In the Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellants

v.

JAMES I. SCHEINER, SECRETARY OF THE DEPARTMENT OF REVENUE, *et al.*,
Appellees

On Appeal from the Supreme Court of Pennsylvania

REPLY BRIEF FOR THE APPELLANTS

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REPLY BRIEF FOR THE APPELLANTS

I. INTRODUCTION.

Because Pennsylvania's defense of the challenged taxes largely ignores the policies that underlie the Commerce Clause, we begin by refocusing the inquiry on those central considerations. Simply stated, the Commerce Clause is designed to create a national common market and to ensure that businesses are not placed at a competitive disadvantage merely because their operations cross state borders. Under the Commerce Clause, state borders "are to be considered irrelevant." *Commonwealth Edison*, 453 U.S. at 619.

The axle tax and marker fee utterly fail to satisfy these principles. Because they are fixed in amount irrespective of the extent of highway use, the levies bear no relation to the presence and activity of interstate truckers within Pennsylvania or to the highway wear and tear they cause. As a result, they impose a far greater effective tax rate upon interstate truckers, who spread their operations over numerous states.

In addition, because they are unapportioned and not subject to reciprocity, flat taxes such as these must be paid over and over, in full amount, as a truck crosses from one flat tax state to another. Thus, an interstate trucker today must pay not only the registration fee in his state of domicile, but also flat tax exactions totalling $655 for each large truck in his fleet ($180 to Pennsylvania, $175 to Arkansas, $150 to Kentucky, $50 each to Indiana and Vermont, and $25 each to Maryland and New Jersey). These cumulative burdens on commerce are not an insubstantial or merely theoretical concern. Amicus North American Van Lines, for example, paid more than $1.25 million in flat taxes to Arkansas and Pennsylvania alone in a single year—nearly $1 million more than an otherwise identical intrastate company would have paid. See Yellow Freight Am. Br. 7-9 & n.3.

Not satisfied with having chosen to finance reconstruction of its bridges by a tax that imposes a far greater cost per mile on out-of-state truckers, the Pennsylvania legislature compounded the discrimination by simultaneously reducing the registration fees for Pennsylvania vehicles to eliminate the impact on them of the new axle tax. It thereby thrust the burden of the axle tax onto out-of-state taxpayers, who must finance virtually all of the State's bridge reconstruction program.

If the Court were to place its imprimatur on Pennsylvania's actions, other state legislatures concerned with finding new sources of revenue while alleviating the tax burdens of their own constituents would be encouraged to follow suit, shattering the Commerce Clause objective of placing local and interstate business on a level plane. The more a trucker participates in a national market by expanding the scope of his operations across state boundaries, the more he is exposed to repeated doses of discriminatory and cumulative state taxation. Especially given the centrality of interstate trucking to national commerce, such discriminatory taxes present the paradigmatic case for intervention by this Court.

Unable to justify this discrimination, Pennsylvania and its amici in the end resort to repeated, and significant, mischaracterizations of our position:

• The principles we espouse would not "freeze" state tax systems in their present form, preclude "rational restructuring" of inequitable burdens, or require states to achieve "perfect equality" in their highway tax systems. We ask only what we believe the Commerce Clause requires: that the states avoid discrimination when they seek to adjust tax burdens, particularly when nondiscriminatory alternatives are readily available.

• Our position does not restrict the *amount* of revenues a state may raise through highway taxes. Nor is it designed to favor large trucking companies at the expense of smaller ones (most ATA members operate fleets of fewer than 50 vehicles) or to favor heavy trucks over

other highway users. Pennsylvania can make trucks pay taxes commensurate with the wear and tear they cause. But it cannot impose a far lower relative tax burden on locally-based trucks than on otherwise identical trucks based outside the state.

• Our arguments are not part of a grand strategy to frustrate state collection of highway taxes, nor is this even remotely a case of the trucking industry versus the states. As evidenced by the amicus briefs filed by Oklahoma and by North Carolina and Utah, many states protest Pennsylvania's discriminatory taxes and find such taxes to be completely unnecessary to finance their own highway systems. Even Pennsylvania's own amici (all of them flat tax states) are not of one mind on the matter. New Jersey attacks both taxes (Br. 2, 7-8) because they are not actually paid by Pennsylvania trucks. Pennsylvania and Arkansas urge the invalidity of retaliatory taxes, while New Jersey defends them. And Vermont, supremely hypocritical, defends Pennsylvania's taxes without mentioning that it has retaliated against trucks registered in Pennsylvania by subjecting them to a mirror-image axle tax. Vt. Stat. Ann. tit. 23, § 3021 (Supp. 1985).

II. PENNSYLVANIA HAS FAILED TO DEMONSTRATE THAT DISCRIMINATORY FLAT HIGHWAY TAXES ARE JUSTIFIED.

A. Because Pennsylvania and its amici focus largely on the constitutionality of flat highway taxes, and because the flat tax issue relates to both the marker fee and the axle tax, we take up that issue first. Flat highway taxes present a quintessential example of "burdens of such a nature as to be capable, in point of substance, of being imposed or added to with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce." *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 255-256

(1938) (citations omitted). Thus, a flat highway tax "in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed." *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U.S. 434, 439 (1939). "To prevent disadvantaging operations that straddle political boundaries, [the Court] ban[s] such flat-rate taxes." Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1188 (1986).

Pennsylvania's response to the critical issue of cumulative burdens is simply to ignore the problem. Its entire discussion of the subject is contained in a single paragraph (Br. 32-33) in which it asserts that the cumulative burden argument is "without factual foundation and . . . irrelevant." There is no need for "factual foundation," however, because such taxes are *inherently* discriminatory in character (see *Nippert*, 327 U.S. at 427-431) and violate the modern Commerce Clause principle of "internal consistency" applied in *Armco*. There, the Court struck down West Virginia's wholesaling tax because of the *potential* impact of adoption of similar taxes by other states, although Armco actually paid no more tax to West Virginia than in-state manufacturers and had not shown that it was actually subject to duplicative taxation elsewhere. See also *Conway*, 508 A.2d at 412 (applying the internal consistency principle to state highway taxes). For interstate truckers, of course, the cumulative burdens are not hypothetical; they now have to pay flat highway taxes to six states in addition to Pennsylvania. See Canadian Trucking Assoc. Am. Br. 7.

Though the discrimination inherent in flat taxes makes it unnecessary to prove actual discrimination, in fact the record here graphically confirms it. See ATA Br. 33-34. Notwithstanding Pennsylvania's specious arguments on this point (Br. 35-38), even its own evidence showed that Pennsylvania-registered trucks were responsible for 51% of all miles driven on the State's highways

by trucks weighing over 17,000 pounds (J.A. 200) but made only 16% of total axle tax payments (J.A. 207). There is no explanation for this disparity other than the discriminatory operation of the axle tax.

Pennsylvania (Br. 2 n.2, 12, 35-36) and Arkansas (Br. 2-4, 10, 12) attempt to blunt the force of these statistics by arguing that a company often has great latitude in choosing where to register its trucks (but see J.A. 239-243) and that in-state and out-of-state registration do not correspond precisely to intra- and interstate commerce. But the fact that some Pennsylvania-registered trucks are engaged in interstate carriage is quite beside the point, because it is impermissible to favor a local company over an out-of-state company even if both participate in interstate commerce. See *Boston Stock Exchange*, 429 U.S. at 335. Moreover, the Commerce Clause condemns a tax that discriminates generally, even though not perfectly, between in-state and out-of-state taxpayers. *BT Inv. Managers, Inc.*, 447 U.S. at 40, 42-43 & n.9. In short, state of registration is a satisfactory proxy for the relevant classes to which Commerce Clause protections apply.

B. Pennsylvania's principal justification of its flat taxes is that, when registration fees are also considered, "trucks registered in Pennsylvania clearly pay a higher price for the use of Pennsylvania highways than do trucks registered in other States" (Pa. Br. 11). Invoking alleged considerations of fairness, the State contends that any discrimination against interstate commerce inherent in flat taxes is "fair" because it is offset by discrimination against local commerce caused by registration fees. This argument embodies a fundamental misunderstanding of registration fees.

First, Pennsylvania has entirely ignored the fact that every truck must pay a registration fee somewhere, and that a portion of that fee pays for the right to travel the highways of other states. Indeed, under the IRP, trucks base-plated in other states pay a share of Pennsylvania's

registration fee, measured by the proportionate extent of their use of Pennsylvania's highways. Since such vehicles pay an appropriate share of Pennsylvania's registration fee directly, it is untenable to subject them to other, discriminatory taxes on the ground that in-state trucks also pay Pennsylvania's registration fee.

Where reciprocity is the basis for travel in Pennsylvania, the payment of Pennsylvania registration fees is constructive, but no less real in economic terms. "In a practical economic sense, reciprocity represents an indirect contribution by foreign-based trucks to the treasury of the State of [Pennsylvania]; the agreement of their home states not to tax [Pennsylvania]-based trucks leaves [Pennsylvania] free to collect more than it otherwise could from its own truckers." *Quinn*, 437 A.2d at 627.

The economic reality is that, under either IRP or reciprocity, trucks base-plated in states other than Pennsylvania pay a fair share of Pennsylvania's registration fees; at the same time, a proportionate share of Pennsylvania's registration fee is allocable to travel by Pennsylvania-based trucks in other states. This is the uniform holding of *Quinn* and the other state supreme court decisions cited at pages 23-24 of our opening brief, to which Pennsylvania offers no response.

Accordingly, while it is true that the registration fee is in one sense a flat tax, apportionment and reciprocity eliminate the risk that cumulative penalties will attach to the decision to operate in interstate commerce. It is this factor, which Pennsylvania and its amici stubbornly refuse to recognize (*e.g.*, N.J. Br. 12-13), that fundamentally differentiates the flat taxes challenged in this case from registration fees. Indeed, the "flatness" of taxes like the marker fee and the axle tax would be unobjectionable if those taxes were apportioned or subject to reciprocity, as registration fees are.

In sum, because registration fees do not discriminate between intra- and interstate commerce, they cannot be

used to justify discriminatory flat taxes. Put another way, if the marker fee and axle tax standing alone discriminate against interstate commerce, as they surely do, they cannot be salvaged by reference to the rest of Pennsylvania's highway tax system, which imposes *no* countervailing discrimination on Pennsylvania-registered trucks.

C. The other prop on which Pennsylvania rests its defense of flat taxes is the old *Aero Mayflower* line of cases. In response to our demonstration that these precedents have been undermined by operational changes in the interstate trucking business and by the modern evolution of Commerce Clause jurisprudence, the defenders of flat highway taxes make the following claims:

1. Pennsylvania argues (*e.g.*, Br. 31) that the rationale of the *Aero Mayflower* line of cases—that flat taxes should be tolerated because of the unavailability of practical, readily administrable, non-discriminatory alternatives—remains valid. Assuming arguendo that today's Court would uphold, on grounds of administrative convenience, a tax that discriminates markedly against interstate commerce, this argument is nevertheless unavailing. All but seven states now manage to raise adequate highway revenues without flat taxes, and Pennsylvania, like every other state, has a system of fuel taxes already in place, complete with reporting and enforcement mechanisms that are "reasonable, cost-effective, [and] easily administered." No. Car. & Utah Am. Br. 7. Simply increasing the rates of those taxes would not introduce substantial new administrative or compliance problems.

Apparently believing it has caught ATA in a contradiction, Vermont makes much (Br. 10-12) of ATA's opposition to so-called "weight-distance" taxes. But there is no inconsistency. That opposition is based on policy objections, not constitutional grounds. While weight-distance taxes are not inherently discriminatory against interstate commerce, they are far more difficult and

costly to administer than fuel taxes, and they are no fairer as a measure of highway wear and tear; fuel taxes are also much less likely to be evaded, because they are collected in advance, usually at the pump. Vermont's assertion (Br. 15 n.23) that many trucks today file no mileage reports is largely irrelevant. It overlooks the fact that intrastate operators pay their state's fuel tax at the pump and, because they travel little if at all outside the state, need not file reports for purposes of determining fuel use tax payments to other states. See J.A. 168-169, 233-234.

2. Related to the foregoing argument are the repeated assertions by Pennsylvania (Br. 9-10) and its amici (Ark. Br. 8-9; Ky. Br. 16-17; N.J. Br. 16) that: (a) trucks in general, and heavy trucks in particular, fail to pay their fair share of highway maintenance costs; and (b) raising fuel taxes, even if wholly feasible, would not solve this problem because, although the amount of fuel tax paid undeniably varies with both weight and mileage, fuel consumption allegedly does not increase with weight to the same extent as highway wear and tear. Whatever the merits of these hotly disputed and unresolved questions of engineering and economics, they are wholly irrelevant to the Commerce Clause issues before this Court.

First, the alleged problem with fuel taxes is spurious. If a state concludes that the fuel tax fails to impose a fair share of highway maintenance costs on heavier vehicles, it need only do as Kentucky and other states have done and impose a surcharge on the fuel tax for such vehicles (see Ky. Br. 4). Second, and more fundamentally, even if a state tax system were to favor heavy trucks over light trucks or trucks over automobiles (or, as Arkansas suggests (Br. 7-8), large, efficient companies over smaller operators), such attributes would not implicate the concern of the Commerce Clause—to avoid discrimination favoring local over interstate commerce. What is relevant is not whether large trucks or small

ones benefit from the tax system, but why two identical trucks, traveling the same number of total miles and causing the same amount of highway wear and tear, should have dramatically different per-mile axle tax or marker fee costs simply because one confines its operations largely or entirely to Pennsylvania while the other operates extensively in interstate commerce. Pennsylvania and its amici offer no answer to that question.

3. Pennsylvania and its amici also rely on references to the *Aero Mayflower* line of cases in *Evansville* and *Massachusetts*, even though neither case involved the kind of issue presented here. It is ironic (and revealing) that *Evansville* should be described as a flat tax case (*e.g.*, Pa. Br. 25; Vt. Br. 20) when the one dollar per-passenger airport tax at issue there was in fact the very model of a non-discriminatory tax—apportioned to the level of passenger traffic and thus to the extent of actual use of the facility. And not only did *Massachusetts* not involve a Commerce Clause issue, but the federal tax challenged there presented a fundamentally different situation: first, there was but a single taxing authority, and therefore no risk of cumulative tax burdens; second, there was no concern that the taxpayer would suffer discrimination at the hands of a government in which it had no voice.

D. In the end, Pennsylvania's flat taxes will stand or fall on the basis of this Court's judgment whether the *Aero Mayflower* line of cases—cases from another era of Commerce Clause jurisprudence—retains vitality today. The Court has had no occasion to revisit this issue since *Capitol Greyhound*. Much has happened in the interim, notably the watershed ruling in *Complete Auto*.

Under *Complete Auto*, all state taxes burdening interstate commerce must pass a four-part test designed to assess "the practical effect of the tax." 430 U.S. at 278. This "consistent and rational method of inquiry" (*Commonwealth Edison*, 453 U.S. at 615) requires both that a tax not discriminate against interstate commerce and

that "the *measure* of the tax must be reasonably related to the extent of the [taxpayer's] contact" with the taxing state (*id.* at 626). "[W]hen the measure of a tax bears no relationship to the taxpayers' presence or activities in a State . . . the State is imposing an undue burden on interstate commerce" (*id.* at 629). By the same token, a tax must have "internal consistency"—*i.e.*, "the tax must be such that, if applied in every jurisdiction, there would be no impermissible interference with free trade." *Armco*, 467 U.S. at 644. It is by these modern tests—not the tests articulated in cases decided decades ago—that the axle tax and marker fee must be evaluated.

Pennsylvania's response to *Complete Auto*, *Commonwealth Edison*, and *Armco* is the bold claim that highway user taxes are somehow completely exempt from their requirements and instead subject solely to an excessiveness test derived from the old cases (see Pa. Br. 25-27). This apparently means, in the view of Pennsylvania and its Supreme Court (see J.S. App. 29a, 34a), that the Commerce Clause is not violated so long as the amount collected from trucks registered outside Pennsylvania does not exceed the costs of repairing Pennsylvania's bridges and maintaining its highways—and never mind that Pennsylvania-registered vehicles are not called upon to carry their proportionate share of these expenses.

The viability of this extraordinary conclusion depends upon Pennsylvania's assertion that when the Court in *Commonwealth Edison* "put to one side" cases involving user fees (453 U.S. at 621-622), it meant to exempt such fees from the *Complete Auto* test. In order to appreciate how implausible Pennsylvania's construction is, the "put to one side" language must be placed in context. In *Commonwealth Edison*, the plaintiffs challenged Montana's severance tax on coal on the ground that it was excessive in relation to the services provided to mining companies by the State, and the plaintiffs expressly relied (Appellants' Br. 32) on the excessiveness

limitation in user charge cases. In rejecting this challenge, the Court held that, because Montana's severance tax was a general revenue tax rather than a user charge, the *amount* of the tax did not have to be tied to the value of the services provided or the extent of the costs incurred by the State due to the taxed activity. Instead, the Court held (453 U.S. at 626, 629) that it was the *measure* of the tax that had to bear a reasonable relation to the taxpayer's presence.

The language relied on by Pennsylvania simply distinguishes user charges from general revenue taxes. Because the Court had no intention of sanctioning user charges that were excessive in relation to the value of the services provided, the Court put such cases "to one side." The Court would surely have been astonished to learn that it was thereby endorsing user charges that violated the third or fourth prongs of *Complete Auto*. Rather, the Court was making clear that such taxes would remain subject to an *additional* excessiveness requirement.

The defenders of flat highway taxes also venture (*e.g.*, Ark. Br. 16) that such taxes do satisfy the fourth prong's "reasonably related" test because they are laid on the "privilege" or "opportunity" to use the taxing state's highways rather than on any actual use. In fact, however, *Complete Auto* discarded the formalistic touchstone of "privilege" in favor of realistic economic analysis of tax effects. It would be a total perversion of the Commerce Clause policies underlying that decision to find that it endorsed a tax on "privilege" wholly unrelated in its measure to the extent the taxpayer actually uses the privilege.

E. Finally, Pennsylvania urges the Court (Br. 33) to leave the question of the constitutionality of flat highway taxes to Congress. This Court has repeatedly rejected such arguments and overruled outdated Commerce Clause precedents (see ATA Br. 47 n.22). As the Court stated in *Washington Stevedoring*, in words that are equally apt here (435 U.S. at 749):

> [R]espondents suggest that what they regard as such an important change in Commerce Clause jurisprudence should come from Congress and not from this Court. To begin with, our rejection of the *Stevedoring Cases* does not effect a significant present change in the law. The primary alteration occurred in *Complete Auto*. Even if this case did effect an important change, it would not offend the separation-of-powers principle because it does not restrict the ability of Congress to regulate commerce.

See also *Japan Line, Ltd.* v. *Los Angeles*, 441 U.S. 434, 454 (1979) ("where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests"). Indeed, in a report cited by Vermont (Br. 5-6), the Department of Transportation and the ICC recognized that the Commerce Clause makes courts "responsible for ruling on the merits of state requirements . . . in the absence of congressional direction." *Report to Congress on Uniform State Regulations Pursuant to Section 19 of the Motor Carrier Act of 1980*, at iii (1982).

Moreover, contrary to the impression Vermont seeks to convey (Br. 3-9), Congress has not undertaken to resolve the interstate tax issues presented here. The various hearings and studies relied on by Vermont concern the need for *procedural* and *administrative* uniformity among the states on such matters as forms and record-keeping, filing and payment mechanisms, and definitions of standards and terms—not the *substantive* validity of flat highway taxes or particular state taxing methods. See, *e.g.*, *Surface Transportation Issues: Hearings Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation*, 98th Cong., 2d Sess. 293 (1984).

Congress may someday move preemptively in this field, though no such action is imminent. In the meanwhile, Congress's inaction—which is all that Vermont has pointed to—is a "treacherous guide to [its] intent"

(*Watt* v. *Alaska*, 451 U.S. 259, 271 n.13 (1981)) and cannot displace the traditional role of this Court.

III. PENNSYLVANIA'S FACIALLY DISCRIMINATORY AXLE TAX CANNOT BE DEFENDED AS A "RATIONAL RESTRUCTURING" OF THE STATE'S HIGHWAY TAX SCHEME.

We showed in our opening brief that Act 234 imposes a new axle tax on interstate commerce (§ 3) while simultaneously lifting the burden of the tax from the shoulders of truckers registered within the State (§ 1). Although Pennsylvania makes a half-hearted attempt to argue that the statute nonetheless is not facially discriminatory, its principal contention is that the discrimination represents merely a "rational restructuring" of the State's highway tax system that was necessary to correct an imbalance in the tax burdens of in-state and out-of-state carriers. In Pennsylvania's view (Br. 17), so long as the aggregate amount of a state's taxes (including registration fees) is higher for in-state trucks, the legislature is free to enact a new tax imposed entirely on out-of-state trucks. As noted above (at 5-7), Pennsylvania's premise rests on a mistaken view of the economic consequences of registration fees. Even if that premise were correct, however, it would not validate the manipulation of Pennsylvania's tax system that accompanied adoption of the axle tax.

This Court has frequently considered the constitutionality of state taxes that were imposed solely or more heavily on interstate commerce. The legal standard developed for evaluating such taxes is the compensatory tax doctrine. Although the Pennsylvania Supreme Court relied on the compensatory tax doctrine in upholding Act 234 (see J.S. App. 33a-34a), the State now acknowledges (Br. 18), as it must (see ATA Br. 20-26), that the axle tax cannot satisfy the requirements of the doctrine.

Pennsylvania's response to this predicament is remarkable. The State begins (Br. 18) by labeling the com-

pensatory tax doctrine a "strawman," even though its own Supreme Court was unable to sustain the tax without invoking that doctrine. Next, it asks this Court to scrap the principle that facially discriminatory taxes can be upheld only if shown to be compensatory and to substitute a lax and ill-defined "rational restructuring" test.

A. This Court has heard Pennsylvania's "add them all up" argument before, and its response has been to adhere to the compensatory tax doctrine. In *Maryland* v. *Louisiana*, for example, Louisiana contended that its first-use tax, which nominally applied to all gas, was designed to equalize competition between in-state and out-of-state interests (451 U.S. at 732). To accomplish this purported "rational restructuring," Louisiana law provided that first-use tax payments would constitute a credit to reduce other taxes on Louisiana gas—as Pennsylvania here has used the axle tax to reduce registration fees. In defense of this discrimination, Louisiana argued:

> [A] state tax cannot be viewed in isolation from the other taxing statutes enacted by the state. Instead, the overall state taxing scheme must be evaluated in determining whether discrimination truly exists. . . . An actual determination whether any discrimination exists requires a careful look at Louisiana's whole taxing structure as well as at the actual effects of the First Use Tax.

Reply of State of Louisiana to Exceptions, *Maryland* v. *Louisiana*, *supra*, at 41, 43 (Dec. 5, 1980). And in upholding Louisiana's first-use tax, the Special Master stated—in terms substantially identical to Pennsylvania's assertion in this case—that the validity of the tax turned on "the effect of the various credits, given the totality of the operation of the state tax provisions" (451 U.S. at 758). This Court rejected that approach, however, holding that the first-use tax discriminated against interstate commerce and could not be justified as a compensatory tax; because the Louisiana tax by its very structure

was discriminatory, it was not necessary to determine "how unequal the [t]ax is before concluding that it unconstitutionally discriminates" (*id.* at 760).

In *Armco*, the Court again rejected an argument (see *Armco* W. Va. Br. 78-84) that a discriminatory tax should be evaluated in the context of the State's overall tax system and was valid because of other, larger levies paid by in-state taxpayers. Like the Pennsylvania Supreme Court in this case, the West Virginia Supreme Court upheld the challenged wholesaling tax on the ground that "no . . . discrimination in favor of local, intrastate commerce occurred because taxpayers manufacturing in the State were subject to a far higher tax" (467 U.S. at 642). Applying the compensatory tax doctrine, this Court reversed, holding that the larger manufacturing tax could not justify the lesser wholesaling tax that was discriminatorily imposed solely on out-of-state companies (*id.* at 642-645).

Inexplicably, Pennsylvania now cites *Maryland* v. *Louisiana* as the sole authority in support of its "rational restructuring" test. See Pa. Br. 16-17. But that decision plainly refutes Pennsylvania's argument, which is no more tenable here than was West Virginia's reliance in *Armco* (Br. 78-79) on the same passages. In finding that the Louisiana first-use tax discriminated against interstate commerce, the Court looked to related sections of the State's code, explaining that "[a] state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme" (451 U.S. at 756). It was necessary to consider the challenged tax in relation to those other provisions to ensure that the State did not, by clever manipulation or indirection, evade the requirements of the Commerce Clause. Once the Court concluded that the first-use tax was discriminatory, however, it applied the compensatory tax doctrine as the governing standard to determine whether the State could justify the tax. *Id.* at 758-760. The same analysis is controlling here. Like the Louisiana first-use tax, the Pennsylvania axle tax dis-

criminates against out-of-state taxpayers, viewed in light of the simultaneous offsetting reductions in Pennsylvania's registration fees, and must satisfy the compensatory tax doctrine in order to be sustained.

B. There is good reason why this Court has never accepted Pennsylvania's vague "add them all up" approach. The compensatory tax doctrine is directly responsive to the concerns that underlie the Commerce Clause. A tax that discriminates against interstate commerce is presumptively unconstitutional because it threatens the very object of the Clause: to protect the nation against the economic inefficiency and inter-state antagonism that protectionist legislation inevitably generates. Such a tax may be upheld despite its facial invalidity only where a non-discriminatory economic effect is unambiguous, *i.e.*, only where the tax at issue is imposed on a "substantially equivalent event" (*Maryland* v. *Louisiana*, 451 U.S. at 759) and results in "strict . . . equality" (*Halliburton Oil*, 373 U.S. at 73) for in-state and out-of-state taxpayers. As the Court explained in *Silas Mason*, 300 U.S. at 584, the compensatory tax doctrine ensures that "the sum is the same when the reckoning is closed."

By contrast, Pennsylvania's amorphous "rational restructuring" test provides no safeguards for ensuring that "the sum is the same" and would open the Commerce Clause to ready evasion. Pennsylvania apparently believes that the Constitution countenances a discriminatory tax whenever a state can point to other tax laws that impose a higher financial burden on in-state taxpayers than out-of-state taxpayers. But a state ordinarily will collect more in total tax revenues from in-state than out-of-state taxpayers because it confers a larger quantity of benefits and services on local residents. Thus, it would be the rare case in which a state would be unable to satisfy Pennsylvania's test for "protecting" interstate commerce.

This case well illustrates the adverse consequences of adopting a "rational restructuring" approach. Under

that approach, a highway tax that discriminates against out-of-state trucks would be sustained whenever the combination of registration fees and other highway taxes paid to the state by out-of-state trucks was less than that paid by in-state trucks. Since the Pennsylvania registration fee for heavy trucks is $945, the State's theory would support not just the existing axle tax of $180, but much greater levies. And if Pennsylvania may impose a large discriminatory tax under this theory, so could every other state.

Beyond this, Pennsylvania's unbounded "rational restructuring" approach would not be judicially manageable. A court would have no way of determining whether the effects of two (or more) different taxes "rationally" counterbalance each other so that the "restructuring" does not treat interstate commerce "unfairly" despite the ostensible facial discrimination. See *Commonwealth Edison*, 453 U.S. at 627-628; J. Hellerstein, *State Taxation: Corporate Income and Franchise Taxes* ¶ 4.12[5], at 150 (1983). Once the Court started down this road, it would be drawn inevitably into making economic comparisons between numerous dissimilar state tax laws to assess whether the aggregate burden on out-of-state interests exceeded that on in-state interests. The Court has refused to engage in precisely this sort of analysis under the compensatory tax doctrine (see *Armco*, 467 U.S. at 643), and there is no greater reason to do so in the guise of making a "rational restructuring" inquiry.

C. On top of these defects, Pennsylvania's freewheeling test offers absolutely no assurance that the legislature has in fact engaged in "rational restructuring" when it adopts a discriminatory tax. Instead, the test puts a premium on the ability of the state's lawyers to scour the tax code and "rationally restructure" the state's tax system *after* a discriminatory enactment has been challenged. Pennsylvania seems to concede as much. Relying on inapposite cases decided under the Equal Protection Clause, it argues (at 19-21) that there need not actually be evidence in the record of a "rational re-

structuring" in order for a discriminatory tax to be upheld. This Court, however, has never accepted appellate counsel's *post hoc* rationalizations to immunize a discriminatory state tax against a Commerce Clause challenge.

Again, this case shows the grave dangers to Commerce Clause policies in adopting Pennsylvania's "rational restructuring" substitute for the compensatory tax doctrine. If anything is clear from the record in this case, it is that the Pennsylvania legislature did *not* purport to be undertaking a "rational restructuring" of highway taxes when it enacted the axle tax. See ATA Br. 24-25, 27. Chief Justice Nix so concluded in his dissent below (J.S. App. 41a-42a), and the majority opinion pointed to no evidence that the legislature actually considered that to be its objective. In fact, "we need not guess at the legislature's motivation" (*Bacchus Imports*, 468 U.S. at 271) here, because the statute adopting the axle tax expressly declares that the purpose of the tax is "to provide for the creation of jobs and the rehiring of [Pennsylvania's] unemployed" (J.S. App. 84a). Nowhere does the statute mention a rational readjustment of disparate tax burdens.

Moreover, the economic effects of the axle tax belie the notion that the statute represents a "rational restructuring." The registration fees that allegedly justified the discriminatory axle tax raised a total of only *$48.5 million* in the 1981-1982 licensing year (see Pa. Br. App. 1a), while the newly-created axle tax raises some *$68 million* annually from out-of-state trucks (J.S. App. 34a). The axle tax thus was no mere adjustment of the State's highway tax scheme to eliminate inequity in the amount of registration fees. Likewise, anomalies in the registration fee reductions accompanying the axle tax, which result in certain lighter trucks paying a higher registration fee than heavier trucks (see ATA Br. 25 n.8), are utterly inconsistent with Pennsylvania's asser-

tion that the statute embodies a "rational restructuring."

On the other hand, Pennsylvania has adduced *nothing* to indicate that the legislature was "rationally restructuring" its highway tax system. The State merely argues in the abstract (at 15-16) that relative tax burdens "can" change over time and that a legislature therefore "can" decide to reallocate the impact of the tax. It does not argue, however, that either of those circumstances in fact occurred here. And even now the State has presented no proof that out-of-state trucks were not paying their fair share of highway costs prior to the axle tax or that the size and structure of the axle tax were carefully designed to correct any such imbalance.

D. Pennsylvania also asserts in a passing footnote (Br. 16 n.15) that the axle tax is valid because the State, instead of simultaneously reducing registration fees to offset the axle tax for Pennsylvania-based trucks, "could properly have accomplished the same result in two steps . . . [if it had] first imposed the Axle Tax on all trucks and later reduced the registration fee." But a state surely could not circumvent the requirements of the Commerce Clause by adopting a two-step discriminatory tax and delaying implementation of the second step in an effort to conceal the discrimination.

It may well be possible to imagine other situations where a state, in unrelated legislation enacted at separate times, both imposes a tax on interstate and local commerce and reduces a tax imposed solely on local commerce. A plaintiff challenging such a tax scheme under the Commerce Clause would bear the burden of proving that the taxes were linked in an effort to discriminate against interstate commerce—a burden that might be difficult to satisfy if the hiatus between the two enactments were sufficiently long and other evidence of discriminatory intent were lacking. But the outcome of

such a hypothetical case has little bearing on the constitutionality of protectionist legislation such as Act 234, which *simultaneously* and *purposely* imposed a new tax on interstate commerce while relieving local residents of its burdens. Pennsylvania can hardly defend the axle tax on the ground that it "might" have taken different action that "might" be constitutional.

IV. PENNSYLVANIA IS NOT ENTITLED TO RETAIN TAXES UNCONSTITUTIONALLY EXACTED.

Implicitly acknowledging the infirmity of its position on the merits, Pennsylvania devotes considerable attention (Br. 35-41) to additional issues that it believes would be open on remand. Contrary to Pennsylvania's assertion, however, no remand is necessary to determine that the challenged taxes discriminate in a manner prohibited by the Commerce Clause. See page 4, *supra*. Moreover, Pennsylvania's severability and prospectivity arguments are plainly wrong and cannot justify the State's retention of the taxes unconstitutionally imposed.

Pennsylvania's arguments that no refund is necessary in this case are flatly inconsistent with the State's position in the proceedings below. Pennsylvania entered into six separate stipulations (see, *e.g.*, J.A. 111-112, 151) providing that "all affected motor carriers will be entitled to receive a refund" of the marker fee and axle tax if ATA "prevail[s] upon the merits" of its challenge. (These stipulations were enforced by the Commonwealth Court. See J.S. App. 62a, 73a.) Pennsylvania disingenuously suggests (Br. 41 n.36) that "the merits" include the issues of severability and prospectivity rather than just the substantive validity of the taxes. That argument is belied by the literal language of the stipulations, which makes clear that a decision for ATA "on the merits" is one "in which [the challenged tax] shall have been declared unconstitutional or its enforcement enjoined" (J.A. 112, 151). Pennsylvania's interpretation also renders the stipulations meaningless; un-

der the State's view, they do nothing more than assure a refund to truckers who would otherwise be entitled to one without regard to the stipulations. And Pennsylvania conveniently ignores the fact that it received valuable consideration from ATA as the *quid pro quo* for the stipulations: ATA withdrew its motions seeking to enjoin collection of the discriminatory taxes—motions that would have relieved out-of-state truckers from having to pay the unconstitutional taxes that the State now refuses to refund. See J.A. 113, 152.

These considerations aside, this Court already has rejected Pennsylvania's "severability" argument. *Bacchus Imports* held that "'severance' would not relieve the harm inflicted during the time [the discriminatory tax was actually in effect]" (468 U.S. at 268 n.7). Likewise, in *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239, 247 (1931), the Court found it "well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law" is not afforded an adequate remedy by a belated "increase of the taxes which the others should have paid."

Pennsylvania's prospectivity argument is even more unsound, since it does nothing at all to remedy the discrimination that has occurred over the last six years. The fact that the State claims to have relied on *Aero Mayflower* (while ignoring more recent cases such as *Complete Auto*) does not compel a prospective decision here at the expense of the purposes of the Commerce Clause. And certainly it has always been understood that a decision in a case, whether prospective or retrospective as to others, has full retroactive force as to the parties before the Court.

In ATA's pending petition for certiorari in *American Trucking Associations, Inc.* v. *Conway*, No. 86-69 (filed July 21, 1986), copies of which have been sent to counsel in this case, we have demonstrated that past decisions of

this Court compel a refund of taxes exacted in violation of the Commerce Clause. Those decisions squarely foreclose Pennsylvania's contentions here. See, *e.g.*, *Ward* v. *Love County*, 253 U.S. 17, 24 (1920).

CONCLUSION

The judgment of the Supreme Court of Pennsylvania should be reversed.

Respectfully submitted.

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No. 86-357

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellants,
v.
JAMES I. SCHEINER, SECRETARY OF THE DEPARTMENT OF REVENUE, *et al.*,
Appellees.

On Appeal from the Supreme Court of Pennsylvania

BRIEF OF YELLOW FREIGHT SYSTEM, INC., CRAIG TRANSPORTATION CO., NORTH AMERICAN VAN LINES, INC., AND B. I. TRANSPORTATION, INC., AMICI CURIAE, IN SUPPORT OF APPELLANTS' REQUEST THAT PROBABLE JURISDICTION BE NOTED

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Pursuant to Rule 36 of the Rules of this Court, Yellow Freight System, Inc., Craig Transportation Co., North American Van Lines, Inc., and B. I. Transportation, Inc. respectfully submit this brief as *amici curiae* in support of appellants' request that probable jurisdiction be noted. The *amici* have sought and received the written consent of the parties to file this brief, and the letters of consent have been submitted to the Court.

INTEREST OF THE AMICI CURIAE

This appeal presents *inter alia* the question whether state highway use taxes that impose a substantially higher effective tax rate on trucks registered outside the taxing State than on trucks registered in it discriminate against interstate commerce in violation of the Commerce Clause of the United States Constitution. The four interstate motor carriers filing this brief as *amici curiae* are subject to the challenged taxes—the Pennsylvania $25-per-truck marker fee and $36-per-axle tax—and to similar highway use taxes imposed by other states. As a victim of the discrimination inflicted by these taxes, each carrier amicus has a direct and substantial interest in this appeal.

This Court has long held that in reviewing a Commerce Clause challenge to a state tax, it is "not the tax in a vacuum of words, but its practical consequences for the doing of interstate commerce in applications to concrete facts [that] are our concern." *Nippert v. Richmond*, 327 U.S. 416, 431 (1946). The four carrier amici have firsthand experience with the practical effects of discriminatory state highway taxes, and can describe in concrete dollars and cents terms the cumulative burden imposed by such taxes on interstate motor carriers. The continuing spread of non-mileage proportioned highway taxes (adopted by seven states since 1980) and their discriminatory impact on thousands of interstate motor carriers warrants this Court granting full review of the issues raised in this appeal.

STATEMENT

The Pennsylvania marker fee and axle tax and similar discriminatory taxes imposed by other states adversely affect the entire interstate motor carrier industry. That industry comprises hundreds of thousands of businesses, ranging from single truck owner-operators to major companies that operate several thousand trucks each. Truck-

ing firms are either "for-hire" carriers or "private" carriers. For-hire carriers transport other people's freight for compensation, while private carriers (manufacturers, merchants, and others) transport their own goods. Together, the two types of carriers utilize over 1.5 million trucks to haul goods approximately 46.5 billion miles interstate each year.[1] Truck transportation is critical to almost every other line of interstate commerce, and ultimately to the livelihoods and leisure activities of virtually all Americans.

The four interstate carrier *amici* represent a cross-section of this major industry. *Amicus* Yellow Freight System, Inc. ("Yellow"), based in Overland Park, Kansas, is one of the largest of the over 32,000 interstate for-hire motor carriers regulated by the Interstate Commerce Commission ("ICC"). 1984 I.C.C. Ann. Rep. Appendix E, Table 1. Yellow transports less-than-truckload shipments of general commodities throughout the United States and parts of Canada using 533 terminals (points of consolidation and distribution). In 1985, Yellow employed over 3,000 trucks to haul freight some 417 million miles interstate. Yellow Freight System, Inc., 1985 Annual Report M to the ICC, Schedule 720, Line 11b; Schedule 730, Line 6b.

Amicus Craig Transportation Co. ("Craig") of Perrysburg, Ohio, is a regulated interstate common carrier of full truckload shipments of general commodities. In 1985, it operated into and through approximately 32 states, using 96 vehicles leased from owner-operators to travel approximately 5.7 million miles. Craig Transportation

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[1] The U.S. Department of Commerce Bureau of the Census' 1982 CENSUS OF TRANSPORTATION, TRUCK INVENTORY & USE SURVEY indicates that for-hire carriers annually operate approximately 650,000 trucks in nearly 30 billion miles of interstate operations (p. 8, Table 2) while private carriers annually operate approximately 800,000 trucks (p. 33, Table 6) in over 16.5 billion miles of long range transportation (p. 90, Table 12).

Co., 1985 Annual Report M, to the ICC, Schedule 720, Line 11b; Schedule 730, Line 6b. Craig is a typical example of the many medium-sized carriers that operate regionally.

Amicus North American Van Lines, Inc. ("NAVL"), headquartered in Fort Wayne, Indiana, is a leading household goods carrier (moving company), as well as a regulated common carrier of general commodities. NAVL is thus representative of both specialty carriers (including tank truck carriers, automobile transporters, and others) and general freight carriers. NAVL's household goods division operates approximately 1,500 leased truck tractors throughout the country. Together with NAVL's general freight fleet, these trucks travel approximately 403 million miles in interstate commerce annually. North American Van Lines, Inc., 1985 Annual Report M to the ICC, Schedule 720, Line 11b; Schedule 722, Line 22.

Amicus B. I. Transportation, Inc. ("B. I."), based in Burlington, North Carolina, is the transportation arm of Burlington Industries, a major textile manufacturer. Utilizing approximately 345 trucks, B. I. transports Burlington's products nationwide. Its fleet travels approximately 41.5 million interstate miles annually. B. I. is representative of the nation's over 119,000 private motor carriers. *See* C. A. TAFT, COMMERCIAL MOTOR TRANSPORTATION 7 (1986). Those carriers use over 800,000 trucks to conduct more than 16.5 billion miles of long range operations annually. *See* Footnote 1, *supra.*

Competition in the interstate trucking industry has increased significantly since passage of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793-826. Over 12,000 new interstate operations have been granted broad, unencumbered authority by the ICC. 1984 I.C.C. Ann. Rep. 50. The ICC has noted that there is now "vigorous price competition in the trucking industry" (*see Lawfulness of Volume Discount Rates—Motor Common Carrier of Property*, 365 I.C.C. 711, 714 (1982)), which

greatly limits carriers' ability to set rates high enough to offset discriminatory state taxes.. In fact, the trucking industry's net income every year since 1978 has been below 3 percent of operating revenues, and in 1985, 33 percent of the carriers operated at a loss. AMERICAN TRUCKING ASSOCIATIONS, INC., FINANCIAL & OPERATING STATISTICS, MOTOR CARRIER ANNUAL REPORT (1978-85 eds.) [based on carriers' Annual Reports M filed with the ICC], Summary Table I, Column 7; Section I-IV, Line 45—Net Carrier Operating Income.

The competitive impact of discriminatory state taxes such as the Pennsylvania marker fee and axle tax—both in terms of competition with locally based carriers and in terms of intermodal competition in the long haul freight business—is a matter of grave concern. In the highly competitive environment in which they operate, interstate motor carriers are especially vulnerable to increased costs resulting from discriminatory taxes. Competition also requires flexibility and deference to customer needs. Because the vagaries of demand make it extremely difficult for carriers to predict where trucks will be needed or what routes they will have to take, it is virtually impossible for interstate carriers to control their level of highway use in any one state in an effort to avoid or mitigate the impact of such taxes.

In these circumstances, interstate motor carriers of all kinds have no choice but to pay the discriminatory highway taxes that an increasing number of states are exacting. Vigorous enforcement of the Commerce Clause, as in the present challenge, represents the carriers' only potential salvation from these costly, unconstitutional state taxes.

ARGUMENT

I. PENNSYLVANIA'S MARKER FEE AND AXLE TAX IMPOSE PER-MILE COSTS ON OUT-OF-STATE MOTOR CARRIERS SEVERAL TIMES THE COSTS THAT THE TAXES IMPOSE ON THEIR IN-STATE COMPETITORS.

Appellants challenge the validity under the Commerce Clause of Pennsylvania's former $25-per-truck marker fee (in effect from 1980 to 1983) and its current $36-per-axle ($180 per typical, 5-axle truck) tax. Each tax, on its face, was found to apply both to trucks registered in Pennsylvania and to trucks registered outside the State. However, this Court has consistently held that in reviewing a Commerce Clause challenge to a state tax, "[t]he principal focus must be the *practical operation* of the statute, since the validity of state laws must be judged chiefly in terms of their *probable effects*." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 37 (1980) (emphasis added). The practical effects of the marker fee and axle tax and other highway use taxes can be determined by examining the relative costs per mile traveled in the taxing state for out-of-state, versus in-state, motor carriers. As discussed below, under such an analysis, each tax discriminates heavily in favor of locally based carriers and therefore violates the Commerce Clause.

Record evidence from a survey conducted by Appellants American Trucking Associations, Inc. ("ATA"), *et al.* shows that, on a classwide basis, the marker fee and axle tax impose a far higher cost per mile on trucks registered outside Pennsylvania than on trucks registered in the State. (J.S. 6) To determine whether the taxes discriminate against the carrier *amici* individually, each has compared its own tax cost per mile (for its fleet of trucks registered outside Pennsylvania) with the tax cost per mile for the average Pennsylvania-registered motor carrier. The *amici* performed the same comparison for Arkansas' $175-per-truck/5¢ per-mile highway use equal-

ization tax, which is under Commerce Clause challenge in a contemporaneous appeal.[2] *American Trucking Associations, Inc. v. Gray*, 55 U.S.L.W. 3175 (U.S., appeal docketed Sept. 3, 1986) (No. 86-358).

Table I below presents these comparisons, and demonstrates the blatantly discriminatory impact of the Arkansas and Pennsylvania taxes.[3] The tax cost-per-mile differentials set forth in Table I add up quickly to huge dollar amounts of discrimination. Table II shows how much excess tax the carrier *amici* are compelled to pay as a result of the non-mileage proportioned highway taxes under challenge in this appeal and *Gray*.

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[2] The average tax cost per mile for the Arkansas-registered and Pennsylvania-registered carriers, set forth in Table I *infra*, is derived from statistical evidence in this case. (PX 12) (Pennsylvania-registered trucks averaged 25,857 miles in-state during calendar year 1981, a figure which, when divided into the annual marker fee of $25 per truck, yields a tax cost per mile of 0.10 cents and, when divided into the annual axle tax of $180-per-(5-axle) truck, yields a tax cost per mile of 0.70 cents) and in appellants' contemporaneous challenge to Arkansas' highway use equalization tax. *American Trucking Associations v. Gray*, 707 S.W.2d 759 (Ark.), *appeal docketed* (U.S., filed Sept. 3, 1986) (No. 86-358) (Arkansas-registered trucks averaged 17,770 miles in-state during calendar year 1982 (PX 38), a figure which, when divided into the annual HUE tax of $175 per truck, yields a tax cost per mile of approximately 1.00 cents).

[3] The data in Table I for Yellow Freight, Craig Transportation, North American Van Lines, and B. I. Transportation were computed on the basis of taxes paid in Arkansas for the tax year ended June 30, 1985, and in Pennsylvania for the tax year ended March 31, 1983 (marker fee) and March 31, 1985 (axle tax). *Amicus* Craig had no taxable operations in Arkansas, or in Pennsylvania with respect to the marker fee, during the relevant tax periods.

TABLE I—*Level of Discrimination*

A Comparison of Interstate Motor Carrier Amici's Tax Cost Per Mile With That of Carriers Registered in the Taxing State

STATE	ARKANSAS	PENNSYLVANIA	PENNSYLVANIA
Type and Amount of Tax	$175 HUE Tax	$25 Marker Fee	$36 Per Axle Tax
CARRIERS REGISTERED IN TAXING STATE			
Average Tax Cost Per Mile	1.00 cents	0.10 cents	0.70 cents
YELLOW FREIGHT SYSTEM			
Tax Paid	$293,094	$53,975	$630,516
In-State Miles Traveled	5,861,881	21,513,335	35,154,130
Tax Cost Per Mile	5.0 cents	0.25 cents	1.79 cents
Ratio to In-State Carrier's Tax Cost	**5 to 1**	**2.5 to 1**	**2.6 to 1**
NO. AMERICAN VAN LINES			
Tax Paid	$387,669	$157,675	$867,810
In-State Miles Traveled	7,753,380	N/A	26,549,633
Tax Cost Per Mile	5.0 cents	N/A	3.27 cents
Ratio to In-State Carrier's Tax Cost	**5 to 1**	**N/A**	**4.7 to 1**
B. I. TRANSPORTATION			
Tax Paid	$14,700	$9,300	$31,221
In-State Miles Traveled	823,662	763,182	999,446
Tax Cost Per Mile	1.78 cents	1.22 cents	3.12 cents
Ratio to In-State Carrier's Tax Cost	**1.8 to 1**	**12.2 to 1**	**4.5 to 1**
CRAIG TRANSPORTATION			
Tax Paid	N/A	N/A	$9,910
In-State Miles Tranveled	N/A	N/A	140.772
Tax Cost Per Mile	N/A	N/A	7.04 cents
Ratio to In-State Carrier's Tax Cost	**N/A**	**N/A**	**10 to 1**

TABLE II—*Cost of Discrimination*

A Projection of Amici's Tax Liability at Average Cost Per Mile Paid
by In-State Registered Carriers and a Calculation of Excess Tax Paid

State & Tax	Ark. HUE Tax	Pa. Marker Fee	Pa. Axle Tax
Tax Cost Per Mile	1.00 cents	0.10 cents	0.70 cents
YELLOW FREIGHT SYSTEM			
Tax Paid	$293,094	$ 53,975	$630,516
Tax Due At In-State Cost Per Mile	$ 58,619	$ 21,513	$246,079
Excess Tax Paid	$234,475	$ 32,462	$384,437
NO. AMERICAN VAN LINES			
Tax Paid	$387,669	$157,675	$867,810
Tax Due At In-State Cost Per Mile	$ 77,534	N/A	$185,847
Excess Tax Paid	$310,135	N/A	$681,963
B. I. TRANSPORTATION			
Tax Paid	$ 14,700	$ 9,300	$ 31,221
Tax Due At In-State Cost Per Mile	$ 8,237	$ 763	$ 6,996
Excess Tax Paid	$ 6,463	$ 8,537	$ 24,225
CRAIG TRANSPORTATION			
Tax Paid	N/A	N/A	$ 9,910
Tax Due At In-State Cost Per Mile	N/A	N/A	$ 985
Excess Tax Paid	N/A	N/A	$ 8,925

As Table I demonstrates, the interstate carrier *amici* are being forced to pay effective tax rates of 1.8 to 12.2 times their in-state counterparts'. As depicted in Table II, this rate differential results in the *amici* paying hundreds of thousands of dollars in excess taxes.[4]

The burden associated with each state's discriminatory highway tax is exacerbated when such taxes are levied by many states. "[I]f [Pennsylvania] can impose such burdens, so can every other State," thereby compounding "the resulting impediments on the free conduct of . . . interstate business." *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 759 (1967). *See also Armco, Inc. v. Hardesty*, 467 U.S. 638, 644 (1984) (a state tax must be such that "if applied by every jurisdiction, there would be no impermissible interference with free trade"); *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 557 (1950) (Frankfurter, J., dissenting) ("an interstate carrier will be subject to privilege taxes of several states, even though his entire use of the highways is not significantly greater than that of intrastate operators").

Already, seven states levy some form of annual non-mileage proportioned highway tax: Arkansas ($175 per truck), Indiana ($50 per truck), Kentucky ($150 per truck), Maryland ($25 per truck), New Jersey ($25 per truck), Pennsylvania ($36 per axle, amounting to $180 per truck for most interstate vehicles), and Vermont

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[4] *Amici* recognize that if Arkansas and Pennsylvania sought to raise the same amount of revenue by a non-discriminatory tax proportioned to highway use rather than by their existing discriminatory taxes, the uniform tax cost per mile would be somewhere between the high rate now paid by trucks registered outside those states and the low rate paid by the in-state carriers. The savings to *amici* from such a revenue-neutral, non-discriminatory tax, while substantial, would be somewhat less than the amounts shown in Table II. The figures in that Table, however, are revealing in that they reflect the magnitude of the disadvantage suffered by *amici* compared to their Arkansas-registered and Pennsylvania-registered competitors.

($50 per truck).[5] The potential burden on interstate commerce from the spread of these discriminatory state taxes is staggering. *Amici* Yellow, North American, and Burlington all engage in nationwide operations, and thus are vulnerable to discriminatory impositions by all 48 contiguous states and the District of Columbia. If all 49 jurisdictions levied taxes like Pennsylvania's axle tax, and the *amici* had the same level of operations in each jurisdiction as they have in Pennsylvania, Yellow would face over $18.8 million in excess taxation, North American over $33.4 million, and Burlington $1.1 million. Even a regional carrier such as Craig, which limits its operations to 32 states, would face an enormous cumulative excess tax burden—over $285,000.

When the challenged taxes' discriminatory effects are extrapolated to the interstate trucking industry as a whole, the burdening of interstate commerce is enormous. In view of the potentially grave adverse effects on interstate commerce of parochial legislation such as the Arkansas HUE tax and the Pennsylvania axle tax and marker fee this Court should give plenary consideration to the issues raised by ATA's appeals.

II. FUEL TAXES—A NON-DISCRIMINATORY FORM OF STATE HIGHWAY TAXATION—PROVIDE A READY ALTERNATIVE TO TAXES NOT PROPORTIONED TO MILEAGE.

The discrimination suffered by interstate carriers is all the more egregious because Arkansas and Pennsylvania could easily avail themselves of an alternative method of highway taxation that is proportioned to each carrier's actual miles traveled in the state. All states,

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[5] Ark. Stat. Ann. §§ 75-817.2, 75-817.3(a)(3), (4) and (5) (Supp. 1985). Ind. Code Ann. § 6-6-8 (Burns Supp. 1986); Ky. Rev. Stat. Ann. § 138.660(4)-(7) (Supp. 1986); Md. Transp. Code Ann. § 13-423(a) (1984); N.J. Stat. Ann. § 54.39 A-10 (West Supp. 1986); Pa. Cons. Stat. Ann. tit. 75 § 2102 (Purdon 1981); Pa. Cons. Stat. Ann. tit. 75, § 9901 *et seq.* (Purdon Supp. 1986); Vt. Stat. Ann. tit. 23, §§ 415, 3007, 3010 (1978 and Supp. 1985).

including Arkansas and Pennsylvania, already levy fuel sales and use taxes that are directly related to a taxpayer's level of highway use.[6] If maintenance requirements justify a rise in Arkansas' or Pennsylvania's highway tax revenues, those states could simply increase their existing fuel taxes. Given the availability of this constitutionally valid alternative, there is no justification for the discriminatory taxes under challenge here and in *Gray*. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (a state action violates the Commerce Clause where "the local interest" [here, the raising of highway tax revenues] "could be promoted as well with a lesser impact on interstate activities").

CONCLUSION

To halt the states' harmful attempts to protect local interests and export their highway tax obligations, this Court should note probable jurisdiction in this appeal and *Gray*, and strike down the challenged taxes under the Commerce Clause.

Respectfully submitted,

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October 1986

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[6] *See* Ark. Stat. Ann. §§ 75-1106, 75-1150, 75-1241, 75-1251, 75-1269 (Repl. 1979); 75-1278 (Supp. 1985) and 72 Pa. Cons. Stat. Ann. §§ 2611a *et seq.*, 2614.1 *et seq.*, 2617.1 *et seq.* (Purdon 1964). The more miles a truck is driven in a state, the more gallons of fuel it consumes and the more tax is paid on the fuel. Pennsylvania also apportions its corporate income tax, when levied on interstate carriers, according to the carrier's total miles traveled in the state. *See* 72 Pa. Cons. Stat. Ann. § 7401(3)2(b) (Purdon Supp. 1986).

(5)

NO. 86-357

Supreme Court, U.S.
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IN THE

SUPREME COURT COURT OF THE UNITED STATES

OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC.
et al.,

Appellants,

v.

JAMES I. SCHEINER,
SECRETARY OF THE DEPARTMENT OF REVENUE,
et al.,

Appellees.

On Appeal from the Supreme Court
of Pennsylvania

BRIEF OF THE STATE OF OKLAHOMA AMICUS CURIAE, IN SUPPORT OF APPELLANTS

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BRIEF OF THE STATE OF OKLAHOMA AMICUS CURIAE, IN SUPPORT OF APPELLANTS

Pursuant to Rule 36 of the Rules of this Court, the State of Oklahoma, by its undersigned Attorney General, respectfully submits this brief as amicus curiae in support of appellants.

INTEREST OF THE AMICUS

This appeal turns on whether a state statute violates the Commerce Clause of

the United States Constitution if it imposes a highway tax that, in its practical application, falls more heavily (if not exclusively) on trucks registered outside the taxing state than on trucks registered in the state. The challenged taxes -- Pennsylvania's annual $36-per-axle tax and former $25-per-truck marker fee -- discriminate against interstate commerce in just this mannter. So does Arkansas' annual $175-per-truck highway use equalization ("HUE") tax, which is the subject of a related appeal (American Trucking Associations, Inc. v. Gray, 55 U.S.L.W. 3175 (U.S., appeal docketed Sept. 3, 1986) (No. 86-358)). Similar non-proportional truck taxes in Indiana, Kentucky, Maryland, New Jersey, and Vermont likewise result in discrimination against out-of-state motor carriers.

Oklahoma motor carriers are victims of these discriminatory highway taxes. Compelled to shoulder a disproportionate

share of Pennsylvania's and the other discriminating states' highway costs, Oklahoma-based truckers suffer inflates costs, reduced productivity, and are at a competitive disadvantage to truckers within such states with discriminatory taxes. The resulting decline in Oklahoma's trucking industry leads to reduced employment. Thus, the State of Oklahoma has an interest in protecting its carriers and their employees from other states' discriminatory taxes. Oklahoma also has an interest in the maintenance of the free flow of interstate commerce, so as to ensure that a competitive, efficient interstate trucking industry is available both to deliver other states' products to Oklahoma's communities and to transport Oklahoma's products to out-of-state markets. In sum, the State of Oklahoma has a direct and substantial interest in this appeal.

STATEMENT

A. Oklahoma's Trucking Industry

Oklahoma's trucking industry comprises thousands of motor carrier companies that operate tens of thousands of trucks. Approximately 33,768 trucks, in excess of 26,000 lbs., base-registered in Oklahoma are involved in interstate commerce.[1] Nearly 100,000 Oklahomans are employed in trucking-related jobs, with an annual payroll of over $1.5 billion. Associated Motor Carriers of Oklahoma, Inc., Oklahoma's Trucking Industry (1986). The trucking industry serves every Oklahoma community, and 62% of Oklahoma's communities depend entirely on trucks to ship and receive goods. Rand McNally & Company, 1981 Commercial Atlas & Marketing Guide, 436-439. All of Oklahoma's industries rely heavily on trucking to transport their products,

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[1] In 1985, 33,768 vehicles in excess of 26,000 lbs. were registered pursuant to the apportioned registration provisions of 47 O.S.Supp.1985, § 1120.

with nearly 75% of commodity transportation (excluding pipelines) by truck. U.S. Department of Commerce, 1977 Census of Transportation, Commodity Transportation Survey, Table 1. Some businesses, such as natural resource producers of many products (e.g., stone and clay), and farmers producing and selling fresh fruits and vegetbles, rely almost exclusively on truck transportation.

Oklahoma's trucking industry is thus a vital part of the state's economy. It directly impacts virtually every other business enterprise in the state, and affects the daily lives of every Oklahoman.

B. Oklahoma's Highway Tax System

The State of Oklahoma has imposed on trucks two non-discriminatory forms of highway tax. The funds raised from such taxes are used to build and maintain nearly 12,000 miles of Oklahoma highways. One tax is an annual truck registration

fee, graduated according to weight. 47 O.S.Supp.1985, § 1133. The other tax is on the purchasing and use of fuel by trucks. 68 O.S.Supp.1985, §§ 502, 516, 520, 524, 603 and 604.

As a member of the International Registration Plan (hereinafter known as "IRP"), Oklahoma charges interstate trucks from other IRP states only a percentage of its usual registration fee. This percentage is based on the ratio of the truck's total miles traveled nationwide to its miles traveled in Oklahoma. Trucks registered in non-IRP states operate in Oklahoma without paying the Oklahoma registration fee because of reciprocity agreements between Oklahoma and those states. Such reciprocity agreements permit Oklahoma-registered trucks to use the highways in these other states. Under both the IRP and reciprocity agreements, interstate trucks avoid the discriminatory burdens imposed by the

Pennsylvania axle tax and similar state taxes that favor locally based trucks.

Oklahoma's second form of highway taxation is on a truck's purchase and use of fuel. 68 O.S.Supp.1985, §§ 502, 516, 520, 524, 603 and 604. Oklahoma taxes all fuel purchased in the state and all fuel used, but purchased outside the state. This tax is non-discriminatory in its operation.

SUMMARY OF ARGUMENT

The challenged Pennsylvania highway taxes discriminate against interstate commerce in two ways. First, the annual $36-per-axle tax scheme represents a form of "structural discrimination." While technically imposing the tax on all trucks, the Pennsylvania legislature simultaneously reduced in-state truck registration fees by amounts equal to the tax, thereby effectively exempting Pennsylvania based trucks from its impact.

Second, both the axle tax and Pennsylvania's $25-per-truck marker fee work an "effective discrimination" against interstate commerce. Due to its non-proportional measure, each tax imposes a far higher effective tax cost per mile on out-of-state trucks than Pennsylvania based trucks. A truck based in Oklahoma faced a substantial economic disadvantage, discriminatory in nature, to trucks registered in states such as Pennsylvania and Arkansas that impose taxes non-proportional to use when using the highways of those states.

Both forms of discrimination against out-of-state trucks, including those registered in Oklahoma, increase their costs, reduce their efficiency, and place them at a significant competitive disadvantage. That disadvantage has worsened as nonproportional highway taxes have spread to Arkansas (see, American Trucking Associations, Inc. v. Gray, 55

U.S.L.W. 3175 (U.S., appeal docketed Sept. 3, 1986) (No. 86-358)) and five other states (id. at 2 & 16). The resulting cumulative tax burden on interstate trucking has far reaching consequences for the economies of those states, including Oklahoma, that rely on a strong, competitive trucking industry.

In this appeal, the Court has the opportunity to declare unconstitutional all forms of state highway tax discrimination, and to require states to use nondiscriminatory taxes to recover their highway costs. Oklahoma's own successful reliance on apportioned/reciporcal truck registration fees and mileage-related motor fuel taxes shows that nondiscriminatory forms of state highway taxation are readily available. Thus, Pennsylvania and Arkansas could satisfy their highway tax needs in a nondiscriminatory and far less burdensome manner as preferred by this Court. See,

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

ARGUMENT

A. The Pennsylvania Axle Tax's Structural Discrimination Against Out-of-State Trucks Cannot Be Justified Under the Compensatory Tax Doctrine.

Pennsylvania's axle tax statute protected Pennsylvania-registered trucks from the impact of the tax by simultaneously reducing in-state truck registration fees by amounts equal to the tax. The Pennsylvania Supreme Court erroneously approved this protection of in-state taxpayers as an appropriate way, under this Court's "compensatory" tax doctrine, to "neutralize or partially offset an economic advantage previously enjoyed by interstate commerce . . ." American Trucking Associations v. Scheiner, 509 A.2d 838, 855 (Pa. 1986). Such an "economic advantage" existed because, the state supreme court supposed, only trucks based in

Pennsylvania are required to pay Pennsylvania's annual truck registration fee.

The court's supposition was incorrect. Pennsylvania's registration fee, like Oklahoma's, in fact is imposed directly or indirectly on all trucks that use its highways, whether or not based in the state. Under the IRP (supra at 6), to which Pennsylvania belongs, all trucks -- regardless of their base state of registration -- must pay a portion of the registration fee of each state in which they operate, the portion to be determined by the percentage of the truck's total miles nationwide that it travels in the state. Likewise, under reciprocity arrangements between Pennsylvania and other states (supra at 6), out-of-state vehicles indirectly pay Pennsylvania a registration fee. As the Maine Supreme Judicial Court correctly found in striking down a discriminatory

highway tax of that state as violative of the Commerce Clause:

> [I]n a practical economic sense, reciprocity represents an indirect contribution by foreign-based trucks to the treasury of the State of Maine; the agreement of their home states not to tax Maine-based trucks leaves Maine free to collect more than it otherwise could from its own truckers.

American Trucking Associations, Inc. v. Quinn, 437 A.2d 623, 627 (Me. 1981). Accord, Private Truck Council of America, Inc. v. New Hampshire, No. 86-088 (N.H. Aug. 12, 1986).

Pennsylvania's registration fee thus is not "compensatory" to the axle tax and therefore cannot be viewed as offsetting the clear structural discrimination created by the axle tax scheme. The inescapable reality is that Oklahoma-registered trucks, like trucks from all other states, are forced to shoulder the axle tax while Pennsylvania trucks are not.

B. The Challenged Taxes Discriminate Against Interstate Commerce in Their Actual Effect Because They Are Not Proportioned to the Level of Highway Use.

The challenged taxes are causing two significant problems. They place a higher cost per mile on Oklahomma-based truckers placing them at a substantial competitive disadvantage. Also, the non-proportioned taxes, like the ones challenged in this appeal plus the ones challenged in the contemporaneous Gray appeal, impose a cumulative tax burden.

The Pennsylvania axle tax, as well as the Pennsylvania marker fee and the Arkansas HUE tax (at issue in the contemporaneous Gray appeal), work an effective discrimination against interstate commerce in their actual operation. Each tax, though facially neutral, operates to disadvantage out-of-state trucks because its incidence is not proportional to highway use. In-state trucks generally

use their own state's highways much more than trucks from other states do. By paying the same amount for much higher usage levels, locally-based trucks enjoy substantially lower per-mile tax costs than their out-of-state counterparts. Taxes such as those at issue in this case are imposed to reimburse the state for highway wear and tear, which is most directly attributable to the level of vehicle mileage. Therefore, a tax that levies a higher effective per-mile tax rate on out-of-state trucks plainly discriminates against interstate commerce.

The Pennsylvania Supreme Court recognizes that "a flat tax imposed upon all commerce may have a greater impact upon interstate commerce if such commerce actually uses the state's services or facilities less than local businesses." American Trucking Associations, supra, at 852. Similarly, the Arkansas Supreme

Court in Gray assumed for the sake of argument that "on a cost per mile basis, out of state truckers are charged more" under the HUE tax American Trucking Associations, Inc. v. Gray, 707 S.W.2d 759, 763 (Ark. 1986). Both courts, however, held that this type of discrimination is permissible.

Oklahoma submits that the decisions of the Pennsylvania and Arkansas Supreme Courts are directly contrary to this Court's well established approach of examining the practical effects of state taxes challenged under the Commerce Clause. Best & Co. v. Maxwell, 311 U.S. 454, 456 (1940); Commonwealth Edison Co. v. Montana, 453 U.S. 609, 616 (1981); Maryland v. Louisiana, 451 U.S. 725, 756 (1981).

The practical effect of the taxes challenged in this appeal and Gray is a per-mile discrimination that places Oklahoma truckers at a substantial dis-

advantage in competing with Pennsylvania and Arkansas based trucks. That competitive disadvantage first exhibits itself as an increased cost vis-a-vis locally based competitors on any transportation operation involving a Pennsylvania or Arkansas movement. Those increased costs later become reduced profits. Oklahoma trucking companies find it harder to expand, make capital investments, improve their efficiency, and operate successfully in the highly competitive trucking market. As Oklahoma's trucking industry suffers, its contribution to Oklahoma's economy also declines, thereby harming the state's other interstate industries.

In addition to the first problem, flat, non-mileage proportioned taxation of interstate trucking has recently spread from Pennsylvania and Arkansas to five other states. Indiana ($50 per truck), Kentucky ($150 per truck),

Maryland ($25 per truck), New Jersey ($25 per truck), and Vermont ($50 per truck) all impose taxes that, while facially neutral, impose higher effective tax costs per mile on out-of-state trucks than in-state trucks. As a result, Oklahoma truckers face a growing cumulative tax burden totally unrelated to the extent of their use of the various states' highways. If this Court upholds the Pennsylvania taxes, similar taxes will likely be adopted by other states, with even more deleterious effects on the free flow of interstate commerce. See Halliburton Oil Well Cementing Company v. Reily, 373 U.S. 69, 72 (1963).

C. Oklahoma Has Adopted "Mirror" Taxes to Protect Its Truckers From the Competitive Disadvantages Caused by the Challenged Taxes.

Oklahoma has attempted to stim these adverse consequences and protect its truckers by enacting "mirror" taxes. 47 O.S.Supp.1985, § 1120(k). The Oklahoma

Tax Commission has the authority to examine other states' taxation of Oklahoma-registered trucks and, if necessary, impose an identical "mirror" tax on the Oklahoma operations of trucks registered in that state. Such authority was given to the Tax Commission to protect Oklahoma truckers from being at an "economic disadvantage" to truckers in states that enact such taxes as the ones challenged in this case and the Gray appeal. H.C. Resolution No. 1001, May 3, 1983.

It was the intention of the legislature in enacting these statutory provisions to have fees of non-Oklahoma-registered trucks comparable to the fees assessed against Oklahoma-registered trucks. This scheme would "provide for uniform treatment of Oklahoma residents operating vehicles in other states and for residents of other states operating in Oklahoma." 47 O.S.Supp.1985, § 1120(k).

Using its discretionary power, the Oklahoma Tax Commission has imposed "taxes" to mirror both Pennsylvania and Arkansas taxes. If and when Pennsylvania or Arkansas eliminates its discriminatory tax on Oklahoma truckers, Oklahoma will cease assessing its mirror tax.

Clearly, the enacting of these challenged taxes of Pennsylvania and Arkansas is forcing other states to adopt legislation to protect its residents. By striking down these challenged taxes, this Court has the opportunity to end the necessity of such action by other state legislatures.

CONCLUSION

Oklahoma fully supports every State's right to assess and collect sufficient highway taxes to meet its own specific highway needs and cost. Indeed, Oklahoma recognizes that it is the responsibility of a state legislature to collect highway taxes to maintain a quality highway

system. Oklahoma disagrees only with the discriminatory form of the challenged taxes. Both Arkansas and Pennsylvania have manipulated their taxes to fall most heavily on those who have no voting representation within the state -- out of state truckers.

For all of the above reasons, the decision of the Pennsylvania Supreme Court should be reversed, and the Pennsylvania axle tax and marker fee should be declared unconstitutional under the Commerce Clause of the United States Constitution.

Respectfully submitted,

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To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 42 of the Rules of this Court, Yellow Freight System, Inc. ("Yellow"), Craig Transportation Co. ("Craig"), North American Van Lines, Inc. ("North

American"), and B. I. Transportation, Inc. ("B. I.") respectfully move for leave to file the accompanying brief as *amici curiae*. Appellants have consented to the filing of this brief; appellees have not.

INTEREST OF YELLOW, CRAIG, NORTH AMERICAN, AND B. I.

This appeal presents *inter alia* the question whether state highway use taxes that impose a substantially higher effective tax rate on trucks registered outside the taxing State than on trucks registered in it discriminate against interstate commerce in violation of the Commerce Clause of the United States Constitution. The four interstate motor carriers seeking to file the accompanying brief as *amici curiae* are subject to the challenged taxes—the Pennsylvania $25-per-truck marker fee and $36-per-axle tax—and to similar highway use taxes imposed by other states. As a victim of the discrimination inflicted by these taxes, each carrier *amicus* has a direct and substantial interest in this appeal.

This Court has long held that in reviewing a Commerce Clause challenge to a state tax, it is "not the tax in a vacuum of words, but its practical consequences for the doing of interstate commerce in applications to concrete facts [that] are our concern." *Nippert v. Richmond*, 327 U.S. 416, 431 (1946). The continuing spread of non-mileage proportioned highway taxes (adopted by seven states since 1980) creates an increasingly serious discriminatory impact on movants. Movants have first hand experience with the practical effects of discriminatory state highway taxes and can inform this Court in concrete dollars and cents terms of the cumulative burden imposed by such taxes on interstate motor carriers.

A grant of leave to file the accompanying brief as *amici curiae* is, therefore, clearly warranted.

Respectfully submitted,

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January 20, 1987

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-357

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellants,

v.

JAMES I. SCHEINER, SECRETARY OF THE DEPARTMENT OF REVENUE, *et al.*,
Appellees.

On Appeal from the Supreme Court of Pennsylvania

BRIEF OF YELLOW FREIGHT SYSTEM, INC., CRAIG TRANSPORTATION CO., NORTH AMERICAN VAN LINES, INC., AND B. I. TRANSPORTATION, INC., AMICI CURIAE, IN SUPPORT OF APPELLANTS

Pursuant to Rule 36 of the Rules of this Court, Yellow Freight System, Inc., Craig Transportation Co., North American Van Lines, Inc., and B. I. Transportation, Inc. respectfully submit this brief as *amici curiae* in support of appellants.

INTEREST OF THE AMICI CURIAE

The interest of Yellow, Craig, North American, and B. I. in this matter is set forth in the accompanying Motion for Leave to File Brief as Amici Curiae.

STATEMENT

The Pennsylvania marker fee and axle tax and similar discriminatory taxes imposed by other states adversely affect the entire interstate motor carrier industry. That industry comprises hundreds of thousands of businesses, ranging from single truck owner-operators to major companies that operate several thousand trucks each. Trucking firms are either "for-hire" carriers or "private" carriers. For-hire carriers transport other people's freight for compensation, while private carriers (manufacturers, merchants, and others) transport their own goods. Together, the two types of carriers utilize over 1.5 million trucks to haul goods approximately 46.5 billion miles interstate each year.[1] Truck transportation is critical to almost every other line of interstate commerce, and ultimately to the livelihoods and leisure activities of virtually all Americans.

The four interstate carrier *amici* represent a cross-section of this major industry. *Amicus* Yellow Freight System, Inc. ("Yellow"), based in Overland Park, Kansas, is one of the largest of the over 32,000 interstate for-hire motor carriers regulated by the Interstate Commerce Commission ("ICC"). 1984 I.C.C. Ann. Rep. Appendix E, Table 1. Yellow transports less-than-truckload

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[1] The U.S. Department of Commerce Bureau of the Census' 1982 CENSUS OF TRANSPORTATION, TRUCK INVENTORY & USE SURVEY indicates that for-hire carriers annually operate approximately 650,000 trucks in nearly 30 billion miles of interstate operations (p. 8, Table 2) while private carriers annually operate approximately 800,000 trucks (p. 33, Table 6) in over 16.5 billion miles of long range transportation (p. 90, Table 12).

shipments of general commodities throughout the United States and parts of Canada using 533 terminals (points of consolidation and distribution). In 1985, Yellow employed over 3,000 trucks to haul freight some 417 million miles interstate. Yellow Freight System, Inc., 1985 Annual Report M to the ICC, Schedule 720, Line 11b; Schedule 730, Line 6b.

Amicus Craig Transportation Co. ("Craig") of Perrysburg, Ohio, is a regulated interstate common carrier of full truckload shipments of general commodities. In 1985, it operated into and through approximately 32 states, using 96 vehicles leased from owner-operators to travel approximately 5.7 million miles. Craig Transportation Co., 1985 Annual Report M, to the ICC, Schedule 720, Line 11b; Schedule 730, Line 6b. Craig is a typical example of the many medium-sized carriers that operate regionally.

Amicus North American Van Lines, Inc. ("NAVL"), headquartered in Fort Wayne, Indiana, is a leading household goods carrier (moving company), as well as a regulated common carrier of general commodities. NAVL is thus representative of both specialty carriers (including tank truck carriers, automobile transporters, and others) and general freight carriers. NAVL's household goods division operates approximately 1,500 leased truck tractors throughout the country. Together with NAVL's general freight fleet, these trucks travel approximately 403 million miles in interstate commerce annually. North American Van Lines, Inc., 1985 Annual Report M to the ICC, Schedule 720, Line 11b; Schedule 722, Line 22.

Amicus B. I. Transportation, Inc. ("B. I."), based in Burlington, North Carolina, is the transportation arm of Burlington Industries, a major textile manufacturer. Utilizing approximately 345 trucks, B. I. transports Burlington's products nationwide. Its fleet travels ap-

proximately 41.5 million interstate miles annually. B. I. is representative of the nation's over 119,000 private motor carriers. *See* C. A. TAFT, COMMERCIAL MOTOR TRANSPORTATION 7 (1986). Those carriers use over 800,000 trucks to conduct more than 16.5 billion miles of long range operations annually. *See* footnote 1, *supra*.

Competition in the interstate trucking industry has increased significantly since passage of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793-826. Over 12,000 new interstate operations have been granted broad, unencumbered authority by the ICC. 1984 I.C.C. Ann. Rep. 50. The ICC has noted that there is now "vigorous price competition in the trucking industry" (*see Lawfulness of Volume Discount Rates—Motor Common Carrier of Property*, 365 I.C.C. 711, 714 (1982)), which greatly limits carriers' ability to set rates high enough to offset discriminatory state taxes. In fact, the trucking industry's net income every year since 1978 has been below 3 percent of operating revenues, and in 1985, 33 percent of the carriers operated at a loss. AMERICAN TRUCKING ASSOCIATIONS, INC., FINANCIAL & OPERATING STATISTICS, MOTOR CARRIER ANNUAL REPORT (1978-85 eds.) [based on carriers' Annual Reports M filed with the ICC], Summary Table I, Column 7; Section I-IV, Line 45—Net Carrier Operating Income.

The competitive impact of discriminatory state taxes such as the Pennsylvania marker fee and axle tax—both in terms of competition with locally based carriers and in terms of intermodal competition in the long haul freight business—is a matter of grave concern. In the highly competitive environment in which they operate, interstate motor carriers are especially vulnerable to increased costs resulting from discriminatory taxes. Competition also requires flexibility and deference to customer needs. Because the vagaries of demand make it

extremely difficult for carriers to predict where trucks will be needed or what routes they will have to take, it is virtually impossible for interstate carriers to control their level of highway use in any one state in an effort to avoid or mitigate the impact of such taxes.

For example, appellant Old Dominion Freight Line, Inc. testified through one of its officials that all its interstate vehicles must be "permitted or qualified to go anywhere within our operating authority" (J.A. 53). An employee of Leonard Brothers Trucking Company, Inc. likewise testified that "[w]e have no way of knowing where the freight is going to go until a customer calls. So we have to have the trucks legalized and ready to go" (J.A. 57). Interstate carriers, therefore, are unable to control either their level of highway use in a state or the number of vehicles they must qualify for operation in that state. This compounds the discrimination attendant to flat per-truck qualification taxes, such as the Pennsylvania marker fee and axle tax, in that carriers must qualify trucks which may never enter the taxing state. The representative of Leonard Brothers Trucking testified that of the 275 Pennsylvania markers it purchased in 1982, it put only 225 on trucks that eventually traveled in Pennsylvania (J.A. 58).

In these circumstances, interstate motor carriers of all kinds have no choice but to pay the discriminatory highway taxes that an increasing number of states are exacting. Vigorous enforcement of the Commerce Clause, as in the present challenge, represents the carriers' only potential salvation from these costly, unconstitutional state taxes.

ARGUMENT

I. PENNSYLVANIA'S MARKER FEE AND AXLE TAX IMPOSE PER-MILE COSTS ON OUT-OF-STATE MOTOR CARRIERS SEVERAL TIMES THE COSTS THAT THE TAXES IMPOSE ON THEIR IN-STATE COMPETITORS.

Appellants challenge the validity under the Commerce Clause of Pennsylvania's former $25-per-truck marker fee (in effect from 1980 to 1983) and its current $36-per-axle ($180 per typical, 5-axle truck) tax. Each tax, on its face, was found to apply both to trucks registered in Pennsylvania and to trucks registered outside the State. However, this Court has consistently held that in reviewing a Commerce Clause challenge to a state tax, "[t]he principal focus must be the *practical operation* of the statute, since the validity of state laws must be judged chiefly in terms of their *probable effects*." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 37 (1980) (emphasis added). The practical effects of the marker fee and axle tax and other highways use taxes can be determined by examining the relative costs per mile traveled in the taxing state for out-of-state, versus in-state, motor carriers. As discussed below, under such an analysis, each tax discriminates heavily in favor of locally based carriers and therefore violates the Commerce Clause.

Record evidence from a survey conducted by appellants American Trucking Associations, Inc. ("ATA"), *et al.* shows that, on a classwide basis, the marker fee and axle tax impose a far higher cost per mile on trucks registered outside Pennsylvania than on trucks registered in the State (J.S. 6). To determine whether the taxes discriminate against the carrier *amici* individually, each has compared its own tax cost per mile (for its fleet of trucks registered outside Pennsylvania) with the tax cost per mile for the average Pennsylvania-registered motor car-

rier. The *amici* performed the same comparison for Arkansas' $175-per-truck/5¢ per-mile highway use equalization tax, which is under Commerce Clause challenge in a contemporaneous appeal.[2] *American Trucking Associations, Inc. v. Gray*, 55 U.S.L.W. 3175 (U.S., appeal docketed Sept. 3, 1986) (No. 86-358).

Table I below presents these comparisons, and demonstrates the blatantly discriminatory impact of the Arkansas and Pennsylvania taxes.[3] The tax cost-per-mile differentials set forth in Table I add up quickly to huge dollar amounts of discrimination. Table II shows how much excess tax the carrier *amici* are compelled to pay as a result of the non-mileage proportioned highway taxes under challenge in this appeal and *Gray*.

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[2] The average tax cost per mile for the Arkansas-registered and Pennsylvania-registered carriers, set forth in Table I *infra*, is derived from statistical evidence in this case (Pennsylvania-registered trucks averaged 25,857 miles in-state during calendar year 1981 (PX 12), a figure which, when divided into the annual marker fee of $25 per truck, yields a tax cost per mile of 0.10 cents and, when divided into the annual axle tax of $180-per-(5-axle) truck, yields a tax cost per mile of 0.70 cents) and in appellants' contemporaneous challenge to Arkansas' highway use equalization tax. *American Trucking Associations v. Gray*, 707 S.W.2d 759 (Ark.), *appeal docketed* (U.S., filed Sept. 3, 1986) (No. 86-358) (Arkansas-registered trucks averaged 17,770 miles in-state during calendar year 1982 (PX 38), a figure which, when divided into the annual HUE tax of $175 per truck, yields a tax cost per mile of approximately 1.00 cents).

[3] The data in Table I for Yellow Freight, Craig Transportation, North American Van Lines, and B. I. Transportation were computed on the basis of taxes paid in Arkansas for the tax year ended June 30, 1985, and in Pennsylvania for the tax year ended March 31, 1983 (marker fee) and March 31, 1985 (axle tax). *Amicus* Craig had no taxable operations in Arkansas, or in Pennsylvania with respect to the marker fee, during the relevant tax periods.

TABLE I—*Level of Discrimination*

A Comparison of Interstate Motor Carrier Amici's Tax Cost Per Mile With That of Carriers Registered in the Taxing State

STATE	ARKANSAS	PENNSYLVANIA	PENNSYLVANIA
Type and Amount of Tax	$175 HUE Tax	$25 Marker Fee	$36 Per Axle Tax
CARRIERS REGISTERED IN TAXING STATE			
Average Tax Cost Per Mile	1.00 cents	0.10 cents	0.70 cents
YELLOW FREIGHT SYSTEM			
Tax Paid	$293,094	$53,975	$630,516
In-State Miles Traveled	5,861,881	21,513,335	35,154,130
Tax Cost Per Mile	5.0 cents	0.25 cents	1.79 cents
Ratio to In-State Carrier's Tax Cost	**5 to 1**	**2.5 to 1**	**2.6 to 1**
NO. AMERICAN VAN LINES			
Tax Paid	$387,669	$157,675	$867,810
In-State Miles Traveled	7,753,380	N/A	26,549,633
Tax Cost Per Mile	5.0 cents	N/A	3.27 cents
Ratio to In-State Carrier's Tax Cost	**5 to 1**	**N/A**	**4.7 to 1**
B. I. TRANSPORTATION			
Tax Paid	$14,700	$9,300	$31,221
In-State Miles Traveled	823,662	763,182	999,446
Tax Cost Per Mile	1.78 cents	1.22 cents	3.12 cents
Ratio to In-State Carrier's Tax Cost	**1.8 to 1**	**12.2 to 1**	**4.5 to 1**
CRAIG TRANSPORTATION			
Tax Paid	N/A	N/A	$9,910
In-State Miles Traveled	N/A	N/A	140,772
Tax Cost Per Mile	N/A	N/A	7.04 cents
Ratio to In-State Carrier's Tax Cost	**N/A**	**N/A**	**10 to 1**

TABLE II—*Cost of Discrimination*

A Projection of Amici's Tax Liability at Average Cost Per Mile Paid by In-State Registered Carriers and a Calculation of Excess Tax Paid

State & Tax	Ark. HUE Tax	Pa. Marker Fee	Pa. Axle Tax
Tax Cost Per Mile	1.00 cents	0.10 cents	0.70 cents
YELLOW FREIGHT SYSTEM			
Tax Paid	$293,094	$ 53,975	$630,516
Tax Due At In-State Cost Per Mile	$ 58,619	$ 21,513	$246,079
Excess Tax Paid	$234,475	$ 32,462	$384,437
NO. AMERICAN VAN LINES			
Tax Paid	$387,669	$157,675	$867,810
Tax Due At In-State Cost Per Mile	$ 77,534	N/A	$185,847
Excess Tax Paid	$310,135	N/A	$681,963
B. I. TRANSPORTATION			
Tax Paid	$ 14,700	$ 9,300	$ 31,221
Tax Due At In-State Cost Per Mile	$ 8,237	$ 763	$ 6,996
Excess Tax Paid	$ 6,463	$ 8,537	$ 24,225
CRAIG TRANSPORTATION			
Tax Paid	N/A	N/A	$ 9,910
Tax Due At In-State Cost Per Mile	N/A	N/A	$ 985
Excess Tax Paid	N/A	N/A	$ 8,925

As Table I demonstrates, the interstate carrier *amici* are being forced to pay effective tax rates of 1.8 to 12.2 times their in-state counterparts' rates. As depicted in Table II, this rate differential results in the *amici* paying hundreds of thousands of dollars in excess taxes.[4]

The burden associated with each state's discriminatory highway tax is exacerbated when such taxes are levied by many states. "[I]f [one State] can impose such burdens, so can every other State," thereby compounding "the resulting impediments on the free conduct of . . . interstate business." *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 759 (1967). *See also Armco, Inc. v. Hardesty*, 467 U.S. 638, 644 (1984) (a state tax must be such that "if applied by every jurisdiction, there would be no impermissible interference with free trade"); *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 557 (1950) (Frankfurter, J., dissenting) ("an interstate carrier will be subject to privilege taxes of several states, even though his entire use of the highways is not significantly greater than that of intrastate operators").

The potential cumulative tax burden today is far worse than Justice Frankfurter envisioned because the trucking industry has expanded dramatically over the last half century. Along with a huge increase in the number of interstate carriers, individual interstate carriers have

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[4] *Amici* recognize that if Arkansas and Pennsylvania sought to raise the same amount of revenue by a non-discriminatory tax proportioned to highway use rather than by their existing discriminatory taxes, the uniform tax cost per mile would be somewhere between the high rate now paid by trucks registered outside those states and the low rate paid by the in-state carriers. The savings to *amici* from such a revenue-neutral, non-discriminatory tax, while substantial, would be somewhat less than the amounts shown in Table II. The figures in that Table, however, are revealing in that they reflect the magnitude of the disadvantage suffered by *amici* compared to their Arkansas-registered and Pennsylvania-registered competitors.

greatly expanded both in terms of the number of vehicles they operate and the range of their operations.

All of the *amici*'s interstate operations have grown dramatically. For example, *amicus* B. I. Transportation in 1935 operated only two trucks and those wholly in North Carolina and by the end of the 1930's operated only 13 trucks in a four state area. By contrast, B. I. in 1985 operated approximately 345 trucks nationwide. *Amicus* North American's operations have shown a similar increase. In 1942, North American operated 32 trucks, compared to over 1,500 today. Its fleet traveled approximately 1.7 million miles in interstate commerce in 1942, compared to over 400 million miles in 1985. Likewise, *amicus* Craig, doing business as Hoefer Motor Transportation Co., served only four states with 25 trucks in 1962 whereas today Craig operates in approximately 32 states through 96 vehicles. *Amicus* Yellow has undergone the most significant expansion. By the end of the 1930's, Yellow operated only 3 trucks, 15 tractors, and 13 trailers in a regional operation serving parts of only four states. In 1985, Yellow utilized nearly 25,000 pieces of equipment, including 3,500 tractors and over 20,000 trailers, and provided a nationwide trucking service.

The major broadening of interstate motor carriers' business operations greatly increases their vulnerability to effectively discriminatory taxes, and significantly heightens the harmful impact of those taxes on their businesses. Already, seven states levy some form of annual non-mileage proportioned highway tax: Arkansas ($175 per truck), Indiana ($50 per truck), Kentucky ($150 per truck), Maryland ($25 per truck), New Jersey ($25 per truck), Pennsylvania ($36 per axle, amounting to $180 per truck for most interstate vehicles), and Vermont ($50 per truck).[5] The potential burden on interstate com-

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[5] Ark. Stat. Ann. §§ 75-817.2, 75-817.3(a)(3), (4) and (5) (Supp. 1985). Ind. Code Ann. § 6-6-8 (Burns Supp. 1986); Ky. Rev. Stat.

merce from the spread of these discriminatory state taxes is staggering. *Amici* Yellow, North American, and B. I. all engage in nationwide operations, and thus are vulnerable to discriminatory impositions by all 48 contiguous states and the District of Columbia. If all 49 jurisdictions levied taxes like Pennsylvania's axle tax, and the *amici* had the same level of operations in each jurisdiction as they have in Pennsylvania, Yellow would face over $18.8 million in excess taxation, North American over $33.4 million, and B. I. $1.1 million. Even a regional carrier such as Craig, which operates in 32 states, would face an enormous cumulative excess tax burden—over $285,000.

When the challenged taxes' discriminatory effects are extrapolated to the interstate trucking industry as a whole, the burdening of interstate commerce is crippling. In view of the potentially grave adverse effects on interstate commerce of parochial legislation such as the Pennsylvania axle tax and marker fee, this Court should reverse the decision below and declare those taxes unconstitutional.

II. FUEL TAXES—A NON-DISCRIMINATORY FORM OF STATE HIGHWAY TAXATION—PROVIDE A READY ALTERNATIVE TO TAXES NOT PROPORTIONED TO MILEAGE.

The discrimination suffered by interstate carriers is all the more egregious because Arkansas and Pennsylvania could easily avail themselves of an alternative method of highway taxation that is proportioned to each carrier's actual miles traveled in the state. All states, including Arkansas and Pennsylvania, already levy fuel sales and use taxes that are directly related to a taxpay-

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Ann. § 138.660(4)-(7) (Supp. 1986); Md. Transp. Code Ann. § 13-423(a) (1984); N.J. Stat. Ann. § 54.39 A-10 (West Supp. 1986); Pa. Cons. Stat. Ann. tit. 75 § 2102 (Purdon 1981); Pa. Cons. Stat. Ann. tit. 75, § 9901 *et seq.* (Purdon Supp. 1986); Vt. Stat. Ann. tit. 23, §§ 415, 3007, 3010 (1978 and Supp. 1985).

er's level of highway use.[6] If maintenance requirements justify a rise in Arkansas' or Pennsylvania's highway tax revenues, those states could simply increase their existing fuel taxes. Given the availability of this constitutionally valid alternative, there is no justification for the discriminatory taxes under challenge here and in *Gray*. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (a state action violates the Commerce Clause where "the local interest" [here, the raising of highway tax revenues] "could be promoted as well with a lesser impact on interstate activities").

CONCLUSION

To halt the states' harmful attempts to protect local interests and export their highway tax obligations, this Court should reverse the judgment of the Supreme Court of Pennsylvania, and strike down the challenged taxes under the Commerce Clause.

Respectfully submitted,

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[6] *See* Ark. Stat. Ann. §§ 75-1106, 75-1150, 75-1241, 75-1251, 75-1269 (Repl. 1979); 75-1278 (Supp. 1985) and 72 Pa. Cons. Stat. Ann. §§ 2611a *et seq.*, 2614.1 *et seq.*, 2617.1 *et seq.* (Purdon 1964). The more miles a truck is driven in a state, the more gallons of fuel it consumes and the more tax is paid on the fuel. Pennsylvania also apportions its corporate income tax, when levied on interstate carriers, according to the carrier's total miles traveled in the state. *See* 72 Pa. Cons. Stat. Ann. § 7401(3)2(b) (Purdon Supp. 1986).

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Appellees.

On Appeal from the Supreme Court of Pennsylvania

BRIEF OF THE STATES OF NORTH CAROLINA AND UTAH, AMICI CURIAE, IN SUPPORT OF APPELLANTS

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BRIEF OF THE STATES OF NORTH CAROLINA AND UTAH, AMICI CURIAE, IN SUPPORT OF APPELLANTS

Pursuant to Rule 36 of the Rules of this Court, the States of North Carolina and Utah, by their undersigned Attorneys General, respectfully submit this brief as amici curiae in support of appellants.

INTEREST OF THE AMICI

This appeal presents the question of whether state highway taxes that, in their purpose or actual operation, fall more heavily on trucks registered outside the taxing state than on trucks registered in the state discriminate against interstate commerce in violation of the Commerce Clause. The taxes at issue -- Pennsylvania's $36-per-axle tax and former $25-per-truck marker fee -- have just such a discriminatory purpose and effect. The same constitutional infirmity infects Arkansas' annual $175-per truck highway use equalization ("HUE") tax, the subject of a related appeal -- American Trucking Associations, Inc. v. Gray, 55 U.S.L.W. 3175 (U.S., appeal docketed Sept. 3, 1986) (No. 86-358)).

Motor carriers registered in the amici States of North Carolina and Utah

are subject to the Pennsylvania taxes and therefore suffer directly from the discrimination those taxes cause. That discrimination results in increased costs, reduced productivity, and a competitive disadvantage for those carriers. An interstate trucking industry handicapped by discrimination cannot provide the competitive, efficient trucking service necessary to both deliver to and transport products from the amici states and cannot make the contribution to the states' economy, in terms of jobs and salaries, that it otherwise could. Additionally, a disability imposed on a state's interstate trucking industry has a ripple effect throughout the state's entire economy because all interstate businesses rely on trucking to secure delivery of raw materials and to transport finished goods to market. Consequently, the amici states have a direct and substantial

interest in this appeal.

STATEMENT

A. The Importance of Interstate Trucking to States' Economies.

The interstate trucking industry plays a central role in the economy of the amici States of North Carolina and Utah. The interstate trucking industry serves every community in these states, and a majority of the communities depend entirely on trucks to ship and receive goods (e.g., in North Carolina, 72% of its communities depend entirely on trucking (Rand McNally & Company, 1983 Commercial Atlas & Marketing Guide, 432-438)). Equally important is the fact that every type of industry in the amici states relies on trucking to obtain raw materials and to transport their products to market (e. g., approximately 70% of all of North Carolina's manufactured products are transported by truck (U.S.

Department of Commerce, 1977 Census of Transportation, Commodity Transportation, Table 1, p. 6)). Additionally, hundreds of thousands of individuals are employed in North Carolina and Utah in trucking-related jobs, which provide annually billions of dollars in salaries.

The interstate trucking industry is an essential component of the amici states' economies. All types of business and industry in the states rely on trucking for transportation services, and the thousands of jobs provided by the trucking industry are vital to each states' economic well-being.

B. State Taxation of Interstate Trucking.

North Carolina and Utah, like the large majority of states, impose a two-tiered highway tax system to raise the funds necessary to build and maintain their highways. The first tier are annual registration fees, graduated

according to weight. Registration fees are applied by the amici states to trucks registered in other states either on a mileage prorated basis under the International Registration Plan ("IRP") or are waived pursuant to reciprocity agreements. Under the IRP, a state charges a foreign truck only a percentage of its usual registration fee, based on the ratio of the truck's total miles nationwide to its miles in the taxing state. Under reciprocity agreements, a state permits trucks that have paid full registration fees to another state to use its highways in exchange for the other state's authorizing trucks registered in the initial state to use its highways. Pursuant to both the IRP and reciprocity arrangements, interstate truckers do not suffer with respect to registration fees the discriminatory burdens they suffer with respect to the challenged Pennsylvania taxes and similar

non-proportioned taxes levied by other states.

The second tier of highway taxes are fuel purchase and use taxes. North Carolina and Utah tax all fuel purchased or used within their bounds. These fuel taxes are directly related to mileage, in that the more miles a truck operates in a state, the more fuel it consumes and the more tax it pays. Additionally, because a heavier vehicle consumes more fuel per mile of operation than a lighter vehicle, fuel taxes necessarily recover a higher tax from heavier trucks to compensate for any additional highway wear and tear caused by the weight of the truck.

The amici states have found their two-tiered highway tax systems provide a reasonable, cost-effective, easily administered way to assess highway taxes based upon a fair approximation of use. Registration fees are intrinsically related to weight and thereby provide a

ready mechanism to recoup highway costs in a manner sensitive to both a truck's weight and its level of usage. Likewise, as discussed, fuel taxes, which annually raise more revenue from trucks than do registration fees ($163 million compared to $81 million in North Carolina in 1985 (U.S. Department of Transportation, Highway Statistics 1985, Tables MV2, MF1, and MF2)), are also sensitive to a truck's weight and level of usage.

SUMMARY OF ARGUMENT

Interstate motor carriers are subjected to two forms of discrimination by the challenged Pennsylvania taxes. First, simultaneous with the imposition of the $36-per axle tax, the Pennsylvania legislature reduced the registration fees of in-state trucks in amounts equal to the tax. The axle tax was thus structured to relieve Pennsylvania

carriers from the financial impact of the tax. It thereby inflicts "structural discrimination" on interstate commerce in violation of the Commerce Clause.

Second, both the axle tax and the $25-per-truck marker fee impose an "effective" discrimination in their actual operation. Because of the non-proportional measure of these taxes, in-state trucks can take advantage of their far more extensive in-state mileage in order to reduce their per-mile tax cost well below that of trucks registered in other states, which make sporadic and far less frequent use of Pennsylvania's highways. Trucks based in the amici States of North Carolina and Utah thus are subjected to a discriminatorily higher per-mile effective tax rate on their Pennsylvania operations, which is not related in any manner to the level of state services provided.

The higher cost per mile imposed on

the amici states' motor carriers places them at a substantial disadvantage in competing with trucks based in a state levying a discriminatory tax. The disadvantage attendant to these non-proportional discriminatory taxes has multiplied as that form of taxation has spread to six other states, including Arkansas (see American Trucking Associations, Inc. v. Gray, No. 86-358 supra). It has also worsened as the level of the flat taxes has risen from the flat $25 marker fee enacted by Pennsylvania in 1980 to a $150-$200 flat tax imposed by Kentucky for the first time in 1987. The spread of these taxes has resulted in a crippling cumulative tax burden totally unrelated to interstate carriers' use of the nation's highways.

The imposition of these discriminatory forms of highway taxation is totally unnecessary since non-

discriminatory forms of highway taxation are readily available to the discriminating states. Amici North Carolina and Utah successfully rely on a two-tiered non-discriminatory system of taxation, including fuel taxes, which is based on a fair approximation of use. Their favorable experience with such taxes stands as clear evidence that non-discriminatory and far less burdensome alternatives are available.

ARGUMENT

A. The Structural Discrimination Resulting From the Imposition of the Axle Tax Cannot Be Justified as a Rational Restructuring of Pennsylvania's Highway Tax Burdens.

The statute enacting the $36-per-axle tax, while facially imposing the tax on all motor carriers, relieved Pennsylvania-registered carriers from the financial impact of the tax by simul-

taneously reducing Pennsylvania registration fees by amounts equal to the axle tax. The Pennsylvania Supreme Court recognized that the intent of the legislature in structuring the axle tax in this manner was to "lessen the burden imposed upon 'local commerce'" (J.S. App. 31a). The court, however, approved the legislative manipulation as a "rational restructuring" of the state's highway tax system, undertaken to offset an economic advantage purportedly enjoyed by interstate commerce.

That supposed economic advantage resulted from the duty of Pennsylvania-registered trucks to pay the state's registration fee, which the court determined was not imposed upon trucks registered in other states. This determination, however, is completely in error. It misapprehends the nature of the registration fee, and ignores out-of-state trucks' payment, either

directly or indirectly, of Pennsylvania's registration fee. Out-of-state trucks under the IRP directly pay Pennsylvania a prorated share of the state's registration fee (supra at 6), and out-of-state trucks under reciprocity indirectly contribute to the Pennsylvania registration fee program. See American Trucking Associations, Inc. v. Quinn, 437 A.2d 623, 627 (Me. 1981) (reciprocity held to represent an indirect contribution by foreign based trucks to the treasury of Maine because the reciprocity agreement allowed Maine to collect more from its in-state based trucks than it otherwise could have).

In sum, since out-of-state trucks are already subject to Pennsylvania registration fees, as well as to registration fees in their own home states, those fees cannot be viewed as offsetting the structural discrimination inherent in the axle tax legislation.

The Pennsylvania legislature was not engaging in a rational restructuring of highway tax liabilities but was instead plainly and deliberately shielding locally based carriers from the financial impact of the tax.

B. Pennsylvania's Axle Tax and Marker Fee Discriminate Against Interstate Commerce in Their Actual Operation Because They Are Not Proportioned to the Level of Highway Use.

1. The Higher Cost Per Mile Imposed on Amici's and Other States' Truckers Puts Them at a Substantial Competitive Disadvantage.

The Pennsylvania axle tax and marker fee, as well as the Arkansas HUE tax and all other non-proportional state highway taxes, work an effective discrimination against interstate commerce in their actual operation. Though facially applicable to all trucks, nonproportional taxes in practice disadvantage out-of-state trucks because the measure of the

taxes is not based on the level of highway use. In-state trucks generally utilize their own state's highways much more than out-of-state trucks. By imposing the same tax for much higher usage levels, states exact a much lower per-mile tax from locally-based trucks than from their out-of-state counterparts. Since highway taxes are imposed to reimburse the state for highway wear and tear, which is most directly attributable to the level of highway use, a tax that levies a higher effective per-mile tax rate on out-of-state trucks plainly discriminates against interstate commerce.

The Pennsylvania Supreme Court recognized the inevitable discriminatory consequences associated with a flat tax when interstate truckers use a state's facilities less than local truckers. Nevertheless, the Court upheld that discrimination, reasoning that "[i]nterstate

motor carriers are free to use the Commonwealth's highways as often and for whatever distances they wish and cannot be heard to complain that because they choose to use those highways less frequently than motor carriers whose vehicles are registered in Pennsylvania may use them, the burden of the flat fee falls too heavily upon them" (J.S. App. 28a) (emphasis in original).

Such reasoning plainly ignores the realities of the interstate trucking business. Because of the nationwide scope of its business, the pressures of vigorous competition, and the demands of shippers, an interstate motor carrier has little or no control over the extent of its use of a particular state's highways. To postulate otherwise disregards the practical economic realities of the businesses subject to taxation and, consequently, the practical effects of the tax on those businesses. Such a

refusal to examine the practical effects of a challenged state tax is directly contrary to this Court's decisions. See Nippert v. Richmond, 327 U.S. 416, 431 (1946); Halliburton Oil Well Cementing Company v. Reily, 373 U.S. 64, 69 (1963); Lewis v. B.T. Inv. Managers, Inc., 447 U.S. 27, 37 (1980).

The practical effect of the axle tax and marker fee is a per-mile discrimination that places truckers based in the amici states at a substantial disadvantage in competing with Pennsylvania-based truckers. That competitive handicap is initially reflected in North Carolina trucks' experiencing higher costs than locally-based competitors whenever they travel through Pennsylvania. Those higher costs depress profits and make it harder for interstate carriers located in the amici states to operate successfully in the highly competitive trucking industry. When its

domestic trucking industry suffers, the overall economies of the amici states also suffer, thereby harming other interstate industries that rely on a healthy interstate trucking industry.

2. Non-Proportional Taxes Like Pennsylvania's Axle Tax and Marker Fee Impose a Cumulative Burden on Interstate Commerce.

Flat, non-mileage proportioned taxation of interstate trucking has recently spread from Pennsylvania and Arkansas to five other states. Indiana ($50 per truck), Kentucky ($150 to $200 per truck), Maryland ($25 per truck), New Jersey ($25 per truck), and Vermont ($50 per truck) all impose taxes that, while facially neutral, impose higher effective tax costs per mile on out-of-state trucks than in-state trucks. As a result, truckers based in the amici states face a growing cumulative tax burden totally unrelated to the extent of

their use of the various states' highways. If this Court upholds the Pennsylvania taxes, similar taxes will surely be adopted by still more states, with a spiraling deleterious effect on the free flow of interstate commerce. See Armco, Inc. v. Hardesty, 467 U.S. 638, 644 (1984).

C. The Amici and Most Other States Finance Highway Construction Through Non-Discriminatory Highway Taxes.

Amici North Carolina and Utah recognize every state's right to assess and collect sufficient highway taxes to build and maintain its highway system. Amici do not question the amount of the highway taxes imposed by either Pennsylvania or Arkansas or any state levying a non-proportional tax. Amici disagree only with the discriminatory form of the challenged taxes. Both Arkansas and Pennsylvania have designed their taxes to protect local interests at

the expense of those who have no voting representation within the state.

Pennsylvania defends the discriminatory impact of its taxes as a necessary evil caused by purported administrative difficulties associated with other more equitable, mileage-related forms of highway taxation (Pennsylvania Motion to Dismiss or Affirm at 21-22). Such a rationalization has no basis in fact. Amici and most other states recoup their highway costs through the two-tiered, non-discriminatory, mileage-related tax system described herein (supra at 6-7). Amici North Carolina and Utah charge an annual truck registration fee that, under the IRP, is apportioned to the truck's miles traveled in their state. Supra at 6. Additionally, amici impose a tax on all motor fuel purchased in their state, and on all motor fuel purchased elsewhere but used in their state. Both the fuel purchase tax and the fuel use tax are

directly related to each truck's actual miles traveled in the state. Supra at 7.

North Carolina and Utah experience no administrative difficulties in implementing their highway tax system. Pennsylvania and Arkansas, in fact, have in place the same two kinds of mileage-related taxes, and need only increase the rates of those taxes if additional revenue is required. Since such non-discriminatory alternatives are readily available, it is clear that Pennsylvania and Arkansas could satisfy their highway tax needs in a non-discriminatory and far less burdensome manner. See Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

CONCLUSION

For all of the above reasons, the decision of the Pennsylvania Supreme Court should be reversed, and the Pennsylvania axle tax and marker fee should be declared invalid under the Commerce Clause.

Respectfully submitted,

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No. 86-357

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellants,

v.

JAMES I. SCHEINER, SECRETARY OF THE DEPARTMENT OF REVENUE, *et al.*,
Appellees.

On Appeal from the Supreme Court of Pennsylvania

MOTION FOR LEAVE TO FILE BRIEF FOR THE CANADIAN TRUCKING ASSOCIATION AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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On Appeal from the Supreme Court of Pennsylvania

MOTION FOR LEAVE TO FILE BRIEF FOR THE CANADIAN TRUCKING ASSOCIATION AS AMICUS CURIAE

The Canadian Trucking Association ("CTA"), a federation of seven regional trucking associations,* requests leave to file the accompanying brief as *amicus curiae* in support of appellants, outside the time limits prescribed by Rule 36 of the Rules of this Court, to bring to the Court's attention the effect of discriminatory state highway tax laws, such as the Pennsylvania statutes at issue in this case, on motor carriers based in Canada.

---

* The CTA's members are the Alberta Trucking Association, the Atlantic Provinces Trucking Association, the British Columbia Motor Transport Association, the Manitoba Trucking Association, the Ontario Trucking Association, the Saskatchewan Trucking Association, and the Trucking Association of Quebec Inc.

Rule 36.2 provides that an *amicus curiae* brief may be filed "within the time allowed for the filing of the brief of the party supported." The Court has previously recognized, however, that this timeliness requirement is not jurisdictional, and it has often granted leave to file out of time where good cause has been shown. See, *e.g.*, *Booth* v. *Maryland*, No. 86-5020 (Feb. 23 1987); *United States* v. *Salerno*, 107 S. Ct. 665 (1986); *Johnson* v. *Transp. Agency*, 107 S. Ct. 311 (1986); *Bowsher* v. *Synar*, 106 S. Ct. 1631 (1986); *International Union, United Automobile Workers* v. *Brock*, 106 S. Ct. 1487 (1986); *Arkansas* v. *Oklahoma*, 465 U.S. 1018 (1984) (granting motion of Commonwealth of Pennsylvania in case challenging discriminatory highway tax); and *Goldstein* v. *California*, 409 U.S. 976 (1972).

In *Goldstein*, for example, the *amicus curiae* trade association sought leave to file a brief out of time because "the direct impact of the case on [the business of its members] was not immediately apparent." Motion of Information Industry Association for Leave To File Brief *Amicus Curiae* at 3, *Goldstein* v. *California*, O.T. 1971, No. 71-1192. Here, too, the Canadian Trucking Association only became aware of this case and of its significance to the interests of the Canadian trucking industry on February 13, 1987. A poll of its members to participate was not concluded until February 25, 1987. Although the CTA monitors some legislative and administrative developments in the United States, it does not normally follow or take part in judicial proceedings in this country.

The CTA believes the attached *amicus curiae* brief will assist the Court in its consideration of this case. Appellants contend Pennsylvania's highway use taxes discriminate against interstate commerce, in violation of the Commerce Clause, because they impose special financial burdens on trucks registered out-of-state. Appellants have argued these burdens grant a competitive advan-

tage to in-state trucks, have a severe cumulative effect on trucks engaging in interstate rather than local commerce, and cause other jurisdictions to enact retaliatory legislation. As explained in the attached *amicus curiae* brief, these effects are particularly pronounced against Canadian motor carriers doing business in the United States.

By the same token, CTA does not believe appellees will be unfairly prejudiced if the brief is accepted for filing. The *amicus curiae* brief does not contain any legal arguments not presented by appellants. Its thrust is to illustrate the force of those arguments by specific reference to published data concerning Canadian truckers. Counsel for appellees was informed February 26, 1987, immediately after the CTA reached its decision to seek leave to file this brief. It has been provided with a typescript copy of this brief in advance of this motion's filing. Appellants have consented to the filing of this brief; appellees have not.

For the foregoing reasons, the motion of the Canadian Trucking Association for leave to file a brief *amicus curiae* in support of appellants should be granted.

Respectfully submitted.

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Appellees.

On Appeal from the Supreme Court of Pennsylvania

BRIEF FOR THE CANADIAN TRUCKING ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

INTEREST OF THE AMICUS CURIAE

The Canadian Trucking Association ("CTA") is a federation of seven regional trucking associations in Canada: the Alberta Trucking Association, the Atlantic Provinces Trucking Association, the British Columbia Trucking Association, the Manitoba Trucking Association, the Ontario Trucking Association, the Saskatchewan Trucking Association, and the Trucking Association of Quebec Inc. These associations, through their membership, represent most of the for-hire trucking industry in

Canada, which consists of more than 50,000 trucks, 40,000 tractors and 60,000 trailers and employs some 90,000 Canadians. The CTA seeks to promote and further the interests of this industry by speaking for Canadian truckers provincially and nationally on policy issues and by following domestic government and industry developments in Canada and internationally in the United States and abroad.

The CTA includes within its constituency the vast majority of Canadian for-hire carriers transporting freight between the United States and Canada, but which engage in little or no interstate or intrastate trucking operations. These carriers have a strong interest in contesting the constitutionality of highway use tax statutes, such as the Pennsylvania marker fee and axle tax, because these statutes impose disproportionately heavy financial burdens on truckers, including Canadian trucking companies, whose business requires them to operate in more than one state. As explained below, the Pennsylvania taxes are particularly harmful to Canadian carriers. Canada and the United States conduct the world's largest volume of bilateral trade. Indeed, trade between the United States and the Province of Ontario alone exceeds that between the United States and Japan. A significant amount of this United States-Canada overland international trade moves by truck. Nearly two-thirds of all Canadian imports to and a similar volume of imports from the United States are delivered to and originate in, respectively, Ontario and Quebec. Pennsylvania's highways serve as a principal route for this trade.

SUMMARY OF ARGUMENT

Appellants contend Pennsylvania's highway use taxes discriminate against interstate commerce, in violation of the Commerce Clause, because they impose special financial burdens on trucks registered outside the State. These burdens grant a competitive advantage to in-state trucks,

have a severe cumulative effect on trucks engaged in interstate, not local commerce, and prompt other jurisdictions to enact retaliatory legislation. *Amicus curiae* CTA agrees with appellants' position. These effects are especially pronounced on Canadian motor carriers transporting freight between the United States and Canada.

Most international road traffic to or from the United States consists of movements to customers in Northern and Eastern regions of the country. Those movements do not normally entail domestic United States service or shipments because United States customs and immigration requirements render such local operations infeasible. Since these are regions in which most of the non-proportional highway tax states are located and since Pennsylvania in particular occupies a key location requiring traversal by most Canadian trucks delivering or picking up goods in the United States, Canadian motor carriers are frequent victims of the discrimination worked by highway taxes not apportioned to road use. Such motor carriers serve primarily domestic Canadian customers. Consequently, their participation in export or import traffic involving the United States is often at irregular intervals and at substantially lower frequency than domestic Canadian commerce. Canada and its Provinces do not now impose such discriminatory taxes on United States motor carriers doing business in Canada. If Canada or any one of its Provinces were compelled to retaliate, this Court would be powerless to eliminate the harmful effects on commerce.

This Court has noted that state restrictions burdening foreign commerce must be subjected to searching scrutiny. Given the discrimination against Canadian trucking companies inherent in non-proportional state highway use taxes, the Pennsylvania axle tax and marker fee cannot survive that scrutiny.

ARGUMENT

I. PENNSYLVANIA'S MARKER FEE AND AXLE TAX DISCRIMINATE AGAINST INTERSTATE AND FOREIGN COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE

A. Pennsylvania's Non-proportional Highway Use Taxes Impermissibly Discriminate Against Interstate and Foreign Commerce

This case challenges the constitutionality of two taxes, the marker fee, 75 Pa. Cons. Stat. Ann. § 2102 (Purdon 1981), and the axle tax, 75 Pa. Cons. Stat. Ann. §§ 9901 *et seq.*, imposed on motor carriers by the Commonwealth of Pennsylvania as a condition of operating on its highways.

Appellants have attacked both statutes under the Commerce Clause of the United States Constitution. They contend the axle tax discriminates against out-of-state motor carriers because, as a result of the contemporaneous reduction in Pennsylvania's registration fees, it effectively applies solely to vehicles registered outside Pennsylvania. Appellants also contend the marker fee and the axle tax, even if deemed to be paid by both in-state and out-of-state trucks, discriminate in their application against non-Pennsylvania-based carriers because they impose flat charges that do not vary with the amount of use made of the State's highways. Pennsylvania trucks thus pay far lower highway use taxes. As a result, both statutes violate the test set forth in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977), because they have a discriminatory impact on interstate commerce and are not fairly related to the services provided by the State.

Amicus curiae CTA fully concurs in and adopts appellants' legal analysis, demonstrating why statutes such as the marker fee and the axle tax impose a disproportionate burden on carriers based outside Pennsylvania.

CTA submits that this burden is not limited to carriers based in other states; the vast majority of carriers registered in Canada and doing business in the United States suffer an identical or greater burden. Non-proportional, regressive highway use taxes, for geographical and other reasons, fall with particular harshness on the Canadian trucking industry.

B. Pennsylvania's Non-proportional Highway Use Taxes Impose Especially Harsh Burdens on Canadian Truckers Doing Business Between the United States and Canada

Appellants have presented three principal reasons why Pennsylvania's marker fee and axle tax are precisely the sort of discriminatory levies the Commerce Clause is designed to prohibit. First, they discriminate against out-of-state trucks, which make far less use of Pennsylvania's highways, by subjecting them to higher average per-mile tax costs. Second, they inhibit the flow of interstate commerce by imposing substantial cumulative burdens on motor carriers that do business in several states. Third, they provoke retaliatory legislation by states whose truckers suffer this discrimination. These adverse effects are especially pronounced in the case of Canadian trucking companies which are engaged only a part of their time in receiving or delivering such foreign commerce goods in the United States.

Canada is a major exporter of goods to the United States. Because virtually all of Canada's principal cities are within 100 miles of the United States border (see App. A., *infra*, 1a), at least half of these goods are transported by truck. In 1984, the Canadian carriers classified as international carriers, *i.e.*, carriers that made at least one for-hire trip out of Canada, operated a total fleet of 72,441 pieces of motor vehicle equipment. See Statistics Canada, *Trucking in Canada, 1984* (Cat.

53-222).[1] Moreover, nearly two-thirds (65.5%) of all Canadian domestic exports to the United States were delivered to two regions, the north central and mid-Atlantic states, that border the major industrialized provinces of Canada, Ontario and Quebec. See App. B, *infra*, 2a.[2] Climate and other considerations cause much of this traffic to move on an occasional or seasonal basis.

These unique characteristics of the Canadian trucking industry mean that Canadian motors carriers are particularly susceptible to the harm appellants describe. Canadian-based trucks, because they are registered in and operated on many routes wholly within Canada, are likely to travel even fewer miles on Pennsylvania's highways than do their typical United States counterparts that are registered in states other than Pennslyvania. Consequently, the axle tax and marker fee impose on them an even higher average tax cost per mile. Furthermore, as the map attached as Appendix B illustrates, the trucks of most Canadian carriers engaged in international hauls are required to traverse Pennsylvania at one time or another, by virtue of that State's central location to the principal customers of Canadian markets. A great many Canadian truckers must, therefore, pay Pennsylvania's non-proportional highway use taxes even though they may make little total use of that State's roads. This result is especially harsh for Canadian fleet owners. They are likely to use only a small number of their vehicles for international operations (but may not know in advance which vehicles will be used).[3] The result is also harsh for the many Canadian carriers whose United States

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[1] Unless otherwise indicated, the data in this brief come from the Statistics Canada study.

[2] The red areas on Appendix B map represent the states that impose discriminatory flat highway taxes.

[3] Carriers attempting to reduce their liability by limiting the number of fleet vehicles for which the taxes are paid suffer substantial inflexibility in their international operations.

markets are seasonal. They have no reason to enter the United States during large portions of the year.

In addition, Canadian motor carriers face an enhanced risk of cumulative taxation. As noted, most Canadian exports and imports are delivered to or picked up from states in the northern and eastern United States;[4] unfortunately, the states with non-proportional highway use taxes are bunched in these two regions. See App. B, *infra*, 2a. For example, a motor carrier from Quebec delivering goods to a customer in Virginia would, it appears, have to traverse the highways of Vermont, Pennsylvania, New Jersey, and Maryland, all of which impose discriminatory highway use taxes. That Canadian trucker would be required to pay each of these states the same amount of tax for several trips that an in-state motor carrier would pay for the use of the highways for an entire year. Undoubtedly, other dramatic examples of discrimination against the Canadian-based trucking industry occur on a daily basis.

Finally, it is possible the proliferation of discriminatory highway use taxes such as the Pennsylvania marker fee and axle tax may compel Canadian provinces or the national government to retaliate against United States carriers based in nonproportional tax states—or, perhaps, against United States carriers generally. *See, Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 450 (1979).[5] United States-based motor carriers operating

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[4] Approximately 2000 Canadian trucks cross the border into the United States daily.

[5] United States-based motor carriers do substantial business in Canada. In 1984, for example, there were 1,226,868 entries into Canada by commercial vehicles domiciled in the United States. Statistics Canada Catalogue 66-001 (Exhibit 2). In addition, from January 1984 to June 1986 a total of 1,476 additional United States carriers filed and were granted (in whole or in part) applications with provincial transport boards, receiving operating rights in Canada.

in Canada currently pay at most three types of highway use taxes: fuel taxes for fuel purchased in Canada; registration fees in British Columbia and Alberta (proportioned pursuant to the International Registration Plan); and special permit fees for overweight or overdimensional loads (as may be required in particular provinces). Neither Canada nor any of its provinces has a non-proportional highway use tax similar to the Pennsylvania axle tax or marker fee. Unlike the situation with retaliatory taxes enacted by other states (see ATA Br. 38), however, this Court is powerless to prevent Canada or one of its Provinces from imposing special highway taxes on trucks based in the United States, despite the serious impact such retaliation could have on trade between the two nations. *See, Japan Line*, 441 U.S. at 450.

In sum, the evils attributable to Pennsylvania's non-proportional highway use taxes apply with special force to Canadian-based motor carriers. This Court has frequently noted that "state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny" under the Commerce Clause. *South-Central Timber Dev.* v. *Wunnicke*, 467 U.S. 82, 100 (1984) (plurality opinion). *See also, Reeves, Inc.* v. *Stake*, 447 U.S. 429, 438 n.9 (1980); and *Japan Line*, 441 U.S. at 446. Accordingly, this Court should declare the Pennsylvania highway use statutes unconstitutional. While the CTA and its members have no objection to paying their fair share of the State's highway expenses, the discriminatory marker fee and axle tax exact an unfair price out of all proportion to highway construction or maintenance needs attributable to operations by Canadian trucking companies.

CONCLUSION

The judgment of the Supreme Court of Pennsylvania should be reversed.

Respectfully submitted.

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March 2, 1987

APPENDIX A

Distance to US Border Points From Major Canadian Cities

Vancouver to US Border	36 km. (22 miles)
Calgary to US Border (Coutts)	168 km. (104 miles)
Edmonton to US Border (Coutts)	467 km. (290 miles)
Regina to US Border (North Portal)	147 km. (91 miles)
Winnipeg to US Border (Emerson)	70 km. (43 miles)
Sault St. Marie to US Border	2 km. (1 mile)
Thunder Bay to US Border	44 km. (27 miles)
Sarnia to US Border	3 km. (2 miles)
Windsor to US Border	8 km. (5 miles)
Hamilton to US Border (Buffalo)	60 km. (37 miles)
Toronto to US Border (Buffalo)	120 km. (75 miles)
Kingston to US Border (Rockport)	45 km. (28 miles)
Ottawa to US Border (Ogdensburg)	84 km. (52 miles)
Montreal to US Border (Champlain)	40 km. (25 miles)
Quebec City to US Border (Rock Island)	171 km. (106 miles)
Moncton to US Border (Calais)	154 km. (96 miles)
Halifax to US Border (Ferry Yarmouth)	169 km. (105 miles)

APPENDIX B

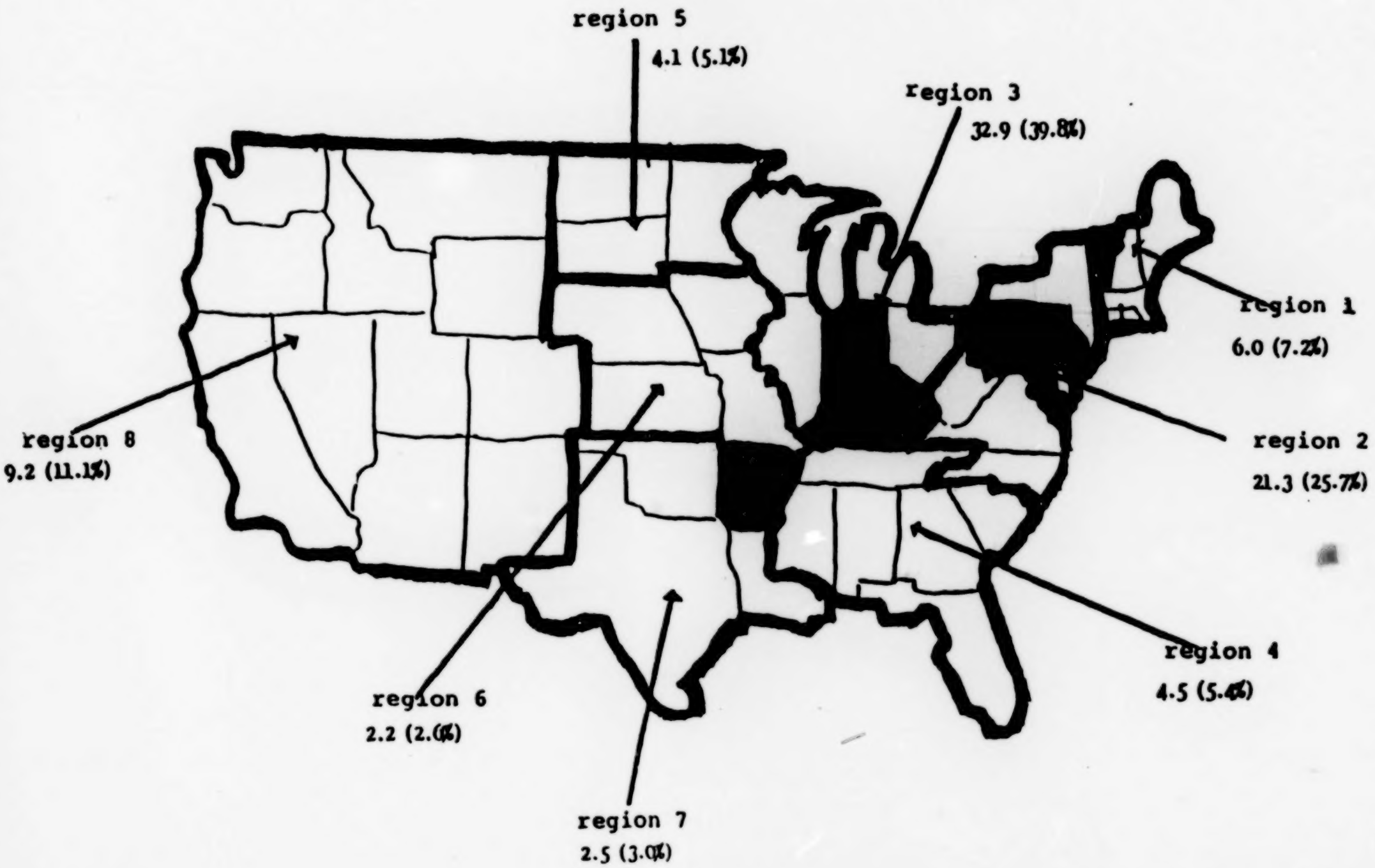
TOTAL DOMESTIC EXPORTS

FROM CANADA TO UNITED STATES

IN REGION

1984

(In Billions)



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BRIEF FOR AMICUS CURIAE STATE OF NEW JERSEY IN SUPPORT OF APPELLEES

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No. 86-357

In The

Supreme Court of the United States

October Term, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,

Appellants,

v.

JAMES I. SCHEINER, SECRETARY OF THE DEPARTMENT OF REVENUE, *et al.*,

Appellees.

On Appeal From the Supreme Court of Pennsylvania

BRIEF FOR AMICUS CURIAE STATE OF NEW JERSEY IN SUPPORT OF APPELLEES

INTEREST OF AMICUS CURIAE

Amicus curiae State of New Jersey submits this brief in support of the Commonwealth of Pennsylvania on the marker fee issue only. New Jersey is interested in this matter because its system of highway user charges is generally similar to Pennsylvania's, with two important exceptions. Like Pennsylvania, New Jersey imposes vehicle registration fees, which are graduated according to truck weight, and a fuels use tax on heavy trucks based on fuel consumed in traveling the State's highways (known in New

Jersey as the motor fuels use tax and in Pennsylvania as the motor carriers road tax.) Incident to its fuels use tax, New Jersey, like Pennsylvania, imposes a $25 truck identification marker fee. New Jersey's identification marker fee was increased from $6 to $25 in 1984 and was immediately challenged by American Trucking Associations ("ATA").* Unlike the situation presented in Pennsylvania, when New Jersey increased the marker fee to $25, it did not deem the fee paid by New Jersey trucks in their registration fees. The $19 increase in the marker fee was required of all trucks subject to the fuels use tax without regard to the state of registration of the truck or the location of the owner/carrier. *N.J. Stat. Ann.* § 54:39A-10 (West 1986) (reproduced in the appendix to this brief at 1a). New Jersey believes that the requirement under Pennsylvania law of looking beyond the four corners of the statutory provision imposing the marker fee on out-of-state trucks to find an offsetting $25 charge on in-state trucks raises a threshold issue of facial discrimination which has not been addressed by the parties.

The other significant difference between Pennsylvania and New Jersey's system of highway user charges is that New Jersey does not have an additional tax on heavy trucks like the Pennsylvania axle tax. New Jersey opposes the axle tax (*see* appendix to ATA's brief on the merits) and retaliates against it. *See Private Truck Council of America, Inc., et al. v. State, et al.*, 510 A.2d 300 (N.J. Super Ct.

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* That case, captioned *American Trucking Associations, Inc., et al. v. Kline, et al.*, is pending in the New Jersey Tax Court, Docket No. 07-14-1667-85 MVT.

Law Div. 1985), app. pending in Docket No. A-1145-85T1 (N.J. Super. Ct. App. Div.).

A broad ruling by this Court invalidating flat highway user charges could call into question facially nondiscriminatory fees such as New Jersey's marker fee and fees such as Pennsylvania's marker fee which are facially discriminatory unless viewed in conjunction with vehicle registration fees. New Jersey thus urges the Court to focus narrowly on the Pennsylvania statutes before it as distinguished from flat highway user charges that, like New Jersey's, are free of any taint of facial discrimination.

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SUMMARY OF ARGUMENT

The threshold issue in the marker fee aspect of this case is not the validity of facially nondiscriminatory flat highway user charges. Rather, the issue is whether Pennsylvania Act 68 of 1980, 75 *Pa. Cons. Stat. Ann.* § 2102(b) (Purdon 1986 pocket part) ("Act 68" or "section 2102 (b)") (reproduced at J.S. App. 80a) is facially discriminatory because it increases the marker fee to $25 but specifies that Pennsylvania-registered vehicles pay the marker fee pursuant to a separate statutory provision imposing vehicle registration fees. If the Court concludes under *Armco Inc. v. Hardesty,* 467 *U.S.* 638 (1984), that Pennsylvania registration fees cannot, consistent with the Commerce Clause, be counted in order to validate the Pennsylvania marker fee, the fee falls as a facially discriminatory tax. In this event, the flat tax issue need not be addressed.

If on the other hand the Court concludes that registration fees can constitutionally be counted to validate the Pennsylvania marker fee, ATA's argument fails on its own terms. If Pennsylvania registration fees are to be counted, the entire fee, not just the $25 segment attributable to the Pennsylvania marker, must be included in the balance. Given the substantial dollar amount of the Pennsylvania registration fee, Pennsylvania-registered trucks must in general pay more per Pennsylvania mile traveled than trucks registered outside the Commonwealth.

Pennsylvania registration fees should be included in determining the constitutional validity of the marker fee because these fees, and for that matter other highway user taxes such as the Pennsylvania motor carriers road tax, are part of a package of highway user charges designed to compensate Pennsylvania for the construction and maintenance of its highway system. As a rent charged by Pennsylvania for state provided facilities, the entire package of user charges should be considered as a whole. It would be anomalous to take a single element of the rent charged and declare it discriminatory if the total charges, when viewed together, are nondiscriminatory and not excessive in amount. The theoretical underpinning of this approach is not that the various charges are compensating or complementary. Nevertheless, vehicle registration fees and other highway user charges do meet the test for compensating taxes set forth in *Armco Inc. v. Hardesty, supra,* and *Maryland v. Louisiana,* 451 *U.S.* 725 (1981).

Finally, should the Court reach the issue of the validity of facially nondiscriminatory flat highway user charges, it should adhere to its long line of cases upholding these im-

positions. The validity of a state tax should not turn on factors not inherent in the tax itself—here the number of miles traveled by a truck in the taxing state. It is too uncertain whether the alleged discrimination, based exclusively on a cost per mile comparison, will invariably occur. Moreover, a state should not be required to devise a perfect highway user charge precisely calibrated to highway use and damage. Facially nondiscriminatory but imprecise formulas, including flat user charges, do not violate the Commerce Clause if the entire system of charges is fair in effect. A flat highway user charge is all the more valid, where, as here, it can be demonstrated that the charge, when analyzed on the basis of factors equally as pertinent as miles traveled, specifically vehicle weight, *favors* out-of-state interests.

—o—

ARGUMENT

POINT I

THE THRESHOLD ISSUE IN THE MARKER FEE ASPECT OF THIS CASE IS THE VALIDITY OF A FACIALLY DISCRIMINATORY STATE HIGHWAY USER CHARGE, NOT THE VALIDITY OF A FACIALLY NONDISCRIMINATORY FLAT CHARGE.

Act 68 amended the Pennsylvania Vehicle Code by increasing from $2 to $25 the fee required to purchase a truck identification marker (Pb3).* 75 *Pa. Cons. Stat. Ann.* § 2102(b) (Purdon 1986 pocket part) (J.S. App. 80a). In

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* The designation "Pb" refers to ATA's brief on the merits.

addition, Act 68 provided that for Pennsylvania-registered vehicles "the vehicle identification marker fee shall be deemed a part of and included in the vehicle registration fee." *Ibid.* The effect of section 2102(b) is to exempt Pennsylvania trucks from the marker fee imposed pursuant to that section and to impose the marker fee on Pennsylvania trucks pursuant to a separate statute requiring the payment of an entirely different fee—vehicle registration fees. 75 *Pa. Cons. Stat. Ann.* § 1916 (Purdon 1986 pocket part) (J.S. App. 86a).* When viewed alone and not in conjunction with Pennsylvania registration fees, section 2102 (b) is thus facially discriminatory because the only fee it imposes is a fee on out-of-state trucks. *See Bacchus Imports, Ltd. v. Dias*, 468 *U.S.* 263, 268, 271 (1984). It is only by recourse to Pennsylvania registration fees that the discriminatory effect of Act 68 can be cured. Thus, the threshold issue is whether a state user charge which discriminates on its face against interstate commerce may be validated by looking to a separate state user charge falling exclusively on intrastate com-

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* As construed by the Pennsylvania Supreme Court (J.S. App. 6a), although included in the Vehicle Code, the identification marker provisions operate "in conjunction with the Motor Carriers Road Tax Act." The motor carriers road tax is part of the Pennsylvania Fiscal Code; the identification marker is issued by the Secretary of Revenue, and, "Purchase of the identification marker decal notifies the Commonwealth that the motor carrier vehicle is subject to the Road Tax Act and triggers that Act's reporting, record keeping and tax-paying requirements" (*Ibid.*). Pennsylvania registration fees are imposed pursuant to the Pennsylvania Vehicle Code (J.S. App. 7a) and are paid to the Pennsylvania Department of Transportation. 75 *Pa. Cons. Stat. Ann.* § 1911(a); 75 *Pa. Cons. Stat. Ann.* § 102 (reproduced at App. 2a).

merce. This analysis does not question the state law conclusion of the Pennsylvania Supreme Court that as a result of Act 68 the $25 Pennsylvania marker fee was in fact paid by Pennsylvania-based vehicles in their registration fees (*see* J.S. App. 23a). The question remains whether the Pennsylvania statutory scheme, as construed by the Pennsylvania Supreme Court, is consistent with the Commerce Clause.

One well known commentator on issues of state tax law has suggested that recourse to other enactments to validate a particular state tax is unwise, and this Court appears to agree:

> Implementation of a rule of law that a tax is nondiscriminatory because other taxes of at least the same magnitude are imposed by the taxing State on other taxpayers engaging in different transactions would plunge the Court into the morass of weighing comparative tax burdens.
>
> • • •
>
> Consequently, both in principle and on practical grounds, there is much to be said for a judicial test of discrimination that, in general at least, does not take into account other taxes on other transactions, but limits itself to the transactions at issue. [J. Hellerstein, *State Taxation, Corporate Income and Franchise Taxes* ¶ 4.12[5] at 150 (1983)].

In *Armco Inc. v. Hardesty, supra,* the court concluded that West Virginia's wholesale gross receipts tax discriminated against interstate commerce because local manufacturers were exempt from the tax. Accordingly, the tax fell exclusively on out-of-state manufacturers making wholesale sales within the state. The fact that local

manufacturers paid a higher manufacturing tax based upon the sale price of the manufactured item did not save the wholesale tax. The two taxes were imposed on different transactions—wholesaling and manufacturing—and it could not be determined which portion of the manufacturing tax was attributable to wholesaling.

Under this line of reasoning, Pennsylvania registration fees cannot be counted in determining whether the marker fee is consistent with the Commerce Clause. A facially discriminatory state tax can be saved by reference to another state tax only if the two enactments are "complementary" or "compensating" as in the case of a sales and compensating use tax. The hallmark of complementary taxes is that the two enactments are imposed upon "substantially equivalent events." *Armco Inc. v. Hardesty* at 642-3. While the argument is made in the portion of its brief attacking the axle tax, ATA maintains that registration fees and a tax paid only by out-of-state trucks are not compensating taxes because they do not relate to substantially equivalent events (Pb23). According to ATA, registration fees purchase the right to operate on the highways of Pennsylvania and many other states while the axle tax purchases the right to operate only in Pennsylvania. If, as ATA maintains, Pennsylvania registration fees may not be counted in order to validate the axle tax, they cannot be counted in order to validate the marker fee.*

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* ATA's position is untenable. ATA assumes the propriety of looking to $25 of the Pennsylvania registration fee, insists that reductions in the Pennsylvania registration fee be looked to in order to establish the discriminatory nature of the axle tax (Pb19), but maintains that the balance of the Pennsylvania registration fee cannot be counted to save the axle tax (Pb23).

In short, the threshold issue confronting the Court in the marker fee aspect of this case is not, as ATA argues, the continued validity of facially nondiscriminatory flat highway user charges, but rather whether a user charge imposed only on out-of-state trucks may be saved by reference to vehicle registration fees imposed on in-state trucks. If registration fees cannot be taken into account to validate the Pennsylvania marker fee, Act 68 discriminates on its face against interstate commerce, and there is no need for this Court to reach the flat tax issue. On the other hand, if registration fees can be taken into account to validate the Pennsylvania marker fee, logically the *entire* registration fee must be counted, not just the $25 portion attributable to the marker fee. If the entire registration fee is counted, ATA's argument founders of its own making because Pennsylvania-registered trucks, which pay the full Pennsylvania registration fee or a substantial portion of it, must generally pay more per mile in Pennsylvania that out-of-state trucks paying the $25 marker fee and in some cases a mileage based portion of their base state registration fee.*

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* Trucks weighing more than 17,000 pounds are subject to the marker fee (Pb4; J.S. App. 6a). For these trucks Pennsylvania registration fees, as reduced by Act 234, range from $237 to $945 per vehicle (J.S. App. 87a). Pennsylvania trucks traveling in jurisdictions which, like Pennsylvania are members of the International Registration Plan ("IRP"), pay a portion of their registration fee, based on mileage, to other IRP jurisdictions (Pb5, n.3), but mileage in non IRP jurisdictions is added to Pennsylvania mileage, thereby increasing the portion of the Pennsylvania registration fee paid to Pennsylvania.

POINT II

IN DETERMINING THE VALIDITY OF A SINGLE HIGHWAY USER CHARGE, ALL STATE CHARGES IMPOSED FOR HIGHWAY USE MUST BE TAKEN INTO ACCOUNT, AND CONSEQUENTLY THE PENNSYLVANIA MARKER FEE DOES NOT VIOLATE THE COMMERCE CLAUSE.

State fees or taxes imposed for the use of state financed transportation facilities* have been analyzed somewhat differently under the Commerce Clause than general revenue taxes. *Interstate Transit, Inc. v. Lindsey,* 283 *U.S.* 183, 190 (1931); *Commonwealth Edison Co. v. Montana,* 453 *U.S.* 609, 621-2 (1981). "Because such charges are purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services . . ." (*Commonwealth Edison Co. v. Montana,* at 622, n.12), the Court has inquired into whether the fees charged are proportionate to the services rendered. *Ibid.* While a flat fee might seemingly be suspect under this test, the Court has taken into account user fees other than the fee at issue in order to decide whether the fees are proportionate to the costs incurred or services rendered. For instance, in *Capitol Greyhound Lines v. Brice,* 339 *U.S.* 542 (1950), the Court sustained a state title tax based on the fair market value of motor vehicles used in interstate and intrastate commerce on the ground that the state also imposed a mileage tax and

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* It is clear that the Pennsylvania marker fee is a revenue raising measure tantamount to a tax, not a regulatory fee. Revenues from the enactment far exceed associated regulatory costs (see Pb4).

that, "[T]his tax added to the title tax is what Maryland actually charges for its road privileges. Thus the total charge as among carriers does vary substantially with the mileage traveled." 339 *U.S.* at 546. *See also Massachusetts v. United States,* 435 *U.S.* 444, 468 (1978). The theoretical basis for including all highway user charges in the balance is that user fees " 'partak[e] . . . of the nature of a rent charged by the State, based upon its proprietary interest in its public property, [rather] than of a tax, as that term is thought of in a technical sense.' " *Commonwealth Edison Co. v. Montana, supra,* at 622, *n.*12, quoting from P. Hartman, *State Taxation of Interstate Commerce,* 122 (1953), *and see Interstate Transit, Inc. v. Lindsey, supra* at 190. If state user charges are in the nature of "rent," it would be unreasonable to assess the constitutional validity of one segment of that rent without taking into account the other payments making up the total charge.

Again because state highway user charges are in the nature of a rent designed to compensate the state for state provided transportation facilities, the Court's compensating tax analysis (set forth in *Armco Inc. v. Hardesty, supra*) should not apply. Regardless of whether the various user charges are imposed upon "substantially equivalent events," the charges should be viewed together and sustained so long as the total burden does not discriminate against out-of-state interests and so long as the total charges do not exceed the benefits conferred. *See Interstate Busses Corp. v. Blodgett,* 276 *U.S.* 245, 251 (1928); *Massachusetts v. United States, supra,* at 468. The possibility that a test of discrimination requiring the Court to weigh the effect of state taxes other than the one at issue could "plunge the Court into the morass of weighing com-

parative tax burdens" (J. Hellerstein, *supra*, at 150) will not materialize in the context of state highway user charges. These charges may be easily weighed because they may all be reduced to cost per mile comparisons.

Alternatively, even under the Court's approach to complementary taxes, registration fees and marker fees are complementary because they are imposed on "substantially equivalent events." Registration fees and marker fees are both imposed for the privilege of using and the actual use of a state's highways. Truckers bearing the burden of registration fees and marker fees are engaged in similar businesses, *i.e.*, interstate trucking. Moreover, there is no potential doubling up of taxes of the kind condemned in *Armco*, 467 *U.S.* at 644. All states impose registration fees, and all non IRP states grant registration reciprocity to vehicles properly registered in their base state. In non IRP jurisdictions, accordingly, registration fees are paid to only one state, and there is no doubling up of those fees. In IRP jurisdictions such as Pennsylvania, the fees are apportioned among states on the basis of miles traveled. Finally, the Pennsylvania Legislature has made clear that precisely $25 of the Pennsylvania registration fee is to be considered the payment of the marker fee for Pennsylvania-registered trucks, 75 *Pa. Cons. Stat. Ann.* § 2102(b) (J.S. App. 80a). Thus, $25 of the Pennsylvania registration fee is in fact a "proxy" for the Pennsylvania marker fee. *Cf. Armco, supra*, at 643.

ATA's argument that registration fees cannot be considered to be complementary to other state highway user charges because registration fees "purchase fundamentally different rights" (Pb23) is fundamentally wrong. If state user charges are assessed to reimburse a state for state pro-

vided facilities, those facilities are what the charges purchase, not some right to travel elsewhere. On the ground where ATA has chosen to mount its attack on the Pennsylvania marker fee, namely its disparate effect on in- and out-of-state trucks on a cost per mile basis, the economic cost to a domestic truck to operate in Pennsylvania plainly includes a portion of its registration fee, while other portions of its registration fee purchase the right to travel in other IRP jurisdictions.

In short, whether or not they are viewed as compensating taxes, all state highway user charges should be taken into account in determining the validity of a particular highway charge. Accordingly, Act 68 does not violate the Commerce Clause by deeming the marker fee paid in the Pennsylvania registration fee of a domestic truck. An evaluation of all highway user charges should be made regardless whether the particular fee challenged applies only to out-of-state vehicles, as does the Pennsylvania marker fee, or is facially neutral like those in New Jersey and other states.

POINT III

SHOULD THE COURT REACH THE ISSUE, FLAT HIGHWAY USER CHARGES ARE AS VALID TODAY AS THEY WERE IN 1916.

Even when the Pennsylvania marker fee is viewed in isolation from all other highway user charges, the fee does not offend the Commerce Clause. Beginning in 1916 and as recently as 1978, the Court has sustained flat user charges against the argument that a flat tax is discriminatory because it is not tailored to actual use of a government owned facility. In *Kane v. New Jersey,* 242 *U.S.* 160

(1916), the Court upheld New Jersey's imposition of vehicle registration fees on residents and nonresidents. The fees were graduated according to horse power but without regard to mileage traveled within the State, so that a nonresident making a single short trip in New Jersey paid the same fee as a resident whose car never left the State. The Court pointed out that the fee was payable by residents and nonresidents alike and reasoned that a state had the option of obtaining compensation for the use of its highways by way of an annual fee, a toll based on mileage, or otherwise. 242 *U.S.* at 168. In 1978, in *Massachusetts v. United States, supra,* the Court sustained an annual flat aircraft registration tax imposed by the Federal Government, rejecting Massachusetts' argument that the tax could not be a user fee because it was not calibrated directly to use of the airways. The tax was a fair approximation of benefits received when viewed together with other charges imposed under the Federal Act. These other charges included a fuel tax, tire tax and tube tax. 435 *U.S.* at 467-8. In 1935 and again in 1947, the Court sustained $25 flat highway user charges. *Aero Mayflower Transit Co. v. Georgia Public Service Commission,* 295 *U.S.* 285 (1935); *Aero Mayflower Transit Co. v. Board of Railroad Commissioners,* 332 *U.S.* 495 (1947).

The Court's holdings over the years have been based generally on one of two theories. First, the out-of-state user is not wronged by his failure to use a state provided facility to the full extent allowed. *Aero Mayflower Transit Co. v. Georgia Public Service Commission, supra,* at 289; *Aero Mayflower Transit Co. v. Board of Railroad Commissioners, supra* at 506, *n.*19. Second, when considered in conjunction with other user charges, a flat fee is fair com-

pensation for the use of a particular government owned facility. *Aero Mayflower Transit Co. v. Board of Railroad Commissioners, supra; Capitol Greyhound Lines v. Brice, supra,* at 546; *Massachusetts v. United States, supra,* at 467-8. In the second line of cases, the Court has pointed out that the states are not required to adopt perfect formulas reflecting "every factor affecting appropriate compensation for road use." *Aero Mayflower Transit Co. v. Board of Railroad Commissioners, supra,* at 506, *n.*19; *Capitol Greyhound Lines v. Brice, supra,* at 546.

Both theories supporting flat user taxes are as valid today as when first announced. The validity of facially nondiscriminatory flat fees should not depend on a factor over which the states have no control, *i.e.* the number of miles driven in-state by a particular out-of-state truck. The number of miles driven in-state is an "adventitious consideration" of the kind found insufficient to invalidate Montana's coal severance tax, which allegedly bore more heavily on out-of-state consumers who received 90% of Montana's coal production. *Commonwealth Edison Co. v. Montana, supra,* at 618.

Nor should the states be required to precisely tailor every highway user charge to actual road use. Approximation must suffice, particularly if a state's combined highway user charges are calibrated generally to road usage and potential road damage and are not excessive in relation to the cost of services provided. *Capitol Greyhound Lines v. Brice, supra,* at 546; *Massachusetts v. United States, supra,* at 467-8. Under the Pennsylvania highway user charge system, highway usage is taken into account by way of the Pennsylvania motor carriers road tax, which is based upon fuel consumed in traveling the Commonwealth's highways

and thus on road usage (J.S. App. 6a). Vehicle weight is taken into account by means of vehicle registration fees, which are graduated according to the vehicle's gross weight (J.S. App. 86a to 87a). When viewed in combination, registration fees, fuels use taxes, and marker fees are a fair approximation of highway use and damage. Moreover, there appears to be no evidence that total Pennsylvania user charges are excessive in relation to the cost of highway services provided by the Commonwealth.

Indeed, when viewed in isolation as ATA would like, the Pennsylvania marker fee discriminates *in favor* of out-of-state trucks. The fee does not increase above $25 once a truck becomes subject to the fee by having a gross weight of more than 17,000 pounds (J.S. 3; J.S. App. 6a; J.S. App. 87a). It is an accepted fact that heavier trucks do more damage to the highways than lighter weight vehicles. *Aero Mayflower Transit Co. v. Board of Railroad Commissioners, supra,* at 503 and 506. In the case before the Court, ATA maintains that virtually the entire cost of the axle tax is borne by out-of-state trucks (Pb15) and points out that, "[M]ost of the trucks subject to the [axle] tax have five axles" and thus pay an axle tax of $180 per truck (Pb32). The table at J.S. App. 40a reflecting the reduction in Pennsylvania registration fees upon enactment of the axle tax shows that five-axle trucks paying $180 per truck are those in the heaviest weight classes. Is is thus apparent that out-of-state trucks as a class are among those which do the most damage to Pennsylvania's highdays. The same conclusion can be drawn from ATA's statement at Pb44 that, "The average length of haul [for an individual truck] has risen to 645 miles and is even longer for heavier trucks." Since highway damage in-

creases with truck weight and since out-of-state trucks tend to be in the heaviest weight classes, it must be concluded that a flat fee, which does not increase with truck weight, favors out-of-state trucks as a class. ATA's cost per mile argument ignores this aspect of the Pennsylvania marker fee and is thus fatally flawed. Accordingly, the Court should reject ATA's cost per mile analysis and should follow its earlier precedents sustaining flat highway user charges.

CONCLUSION

For the reasons set forth above, the judgment of the Supreme Court of Pennsylvania upholding the marker fee should be affirmed.

Respectfully submitted,

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Dated March 5, 1987

APPENDIX

N.J. Stat. Ann. § 54:39A-10. Identification cards and markers; trip permits

The director shall issue to every user a motor fuel user identification card, which shall be safely preserved in the user's offices for as long as the card is valid. The user shall place a photographic copy of said card in the cab of each motor vehicle used in his operations. The director shall also issue for each vehicle operated by the user an identification marker, which shall be affixed to the vehicle in such manner as shall be prescribed by the director. The fee for each original such marker and any replacement marker shall be $25.00. Every identification card and marker shall remain the property of the State and may be recalled for any violation of this act or of the regulations promulgated hereunder, or for failure to pay any monies due the State under this act or any other law administered by the director. Identification cards and markers shall be issued on an annual basis as of April 1 of the year and shall be valid through the next succeeding March 31. The form and content of the card and marker shall be as prescribed by the director. Any card and marker issued pursuant to this act may be deemed by the director as satisfying the equivalent requirements of any other law administered by him, and any marker and card issued by him pursuant to any other law, regulation, reciprocity agreement or arrangement, or declaration may be deemed as satisfying the equivalent requirements of this act. It shall be illegal to operate or cause to be operated in this State any motor vehicle, unless the vehicle bears the identification marker and carries the copy of the identification card

required by this section; provided, however, that upon the request of a user the director may issue by mail or telecommunication a permit valid for the operation of a vehicle for a period not exceeding 25 days, pending the application for and issuance of an identification card or marker, or both. The fee for such permit shall be $8.00, which may be credited against the identification marker fee applicable to the same vehicle. A user whose vehicles in the aggregate make not more than six trips into or through this State in a 12-month period may be issued single trip permits valid for 96 hours for each round trip so made. The fee for such trip permit shall be $10.00, which shall be in lieu of reports, fees and taxes which may otherwise be applicable to said trip under this act.

L.1963, c. 44, § 10. Amended by L.1964, c. 84, § 1; L.1964, c. 258, § 3; L.1965, c. 200, § 1, eff. Dec. 17, 1965; L.1973, c. 117, § 10, eff. July 1, 1972; L.1979, c. 4, § 1, eff. Jan. 16, 1979; L.1984, c. 73, § 34, eff. July 10, 1984; L.1985, c. 7, § 3, eff. Jan. 16, 1985.

75 Pa. Cons. Stat. Ann.

§ 102. Definitions

"Department." The Department of Transportation of the Commonwealth.

§ 1911. Annual registration fees

(a) General rule.—An annual fee for the registration of vehicles as provided in Chapter 13 (relating to the registration of vehicles)[1] shall be charged by the department as provided in this title.

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[1]Section 1301 et seq.

Supreme Court, U.S.
FILED
MAR 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-357

In the

Supreme Court of the United States

October Term, 1986

American Trucking Associations, Inc., et al., ... *Appellants*

V.

James I. Scheiner, Secretary of the Department of Revenue, et al., ... *Appellees*

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

BRIEF OF THE STATE OF ARKANSAS, *AMICUS CURIAE*, IN SUPPORT OF APPELLEE

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INTEREST OF AMICUS CURIAE

In its brief on the merits the appellants present a two pronged attack on the challenged Pennsylvania taxes. The first, questioning what the Supreme Court of Pennsylvania found to be a rational restructuring of that state's motor vehicle special revenue taxes through passage of the "axle tax" (75 Pa. Cons. Stat. Ann. §9901 et. seq.) and a simultaneous reduction in some motor vehicle registration fees, obviously turns to a great extent on the particular tax payments and privileges secured under the Pennsylvania user fee package before and after the imposition of the axle tax. The reach of this kind of challenge is by its nature somewhat restricted to the parties. The second challenge is much broader: as the State of Arkansas understands the appellants' argument (appellants' brief at 28 - 49) it is asking this Court to declare *any* reliance upon a non-discriminatory "flat rate" fee as *any* part of a state's mix of special revenue highway user fees to be a violation of the Commerce Clause of the United States Constitution.

A decision on this ground would impact every State in the union and reverse a solid line of precedent upon which states have relied in funding their transportation improvements from at least 1935 through 1978. Moreover, the impact of this decision (or at least the articulation of its rationale) could directly and substantially impact the State of Arkansas in litigation currently pending before this Court.

In 1983 the Arkansas legislature raised the gross weight limit for motor vehicles traveling over the highways of the state from 73,280 pounds to 80,000 pounds. Act 7 of 1983, Ark. Stat. Ann. §75-817 (Supp. 1985). In that same session the legislature also passed a tax package, Act 685 of 1983, Ark. Stat. Ann. §§75-817.2, 75-817.3 (Supp. 1985) which applied to "all motor vehicles . . . having a declared gross weight of 73,281 pounds or more." Ark. Stat. Ann. §75-817.3 (a) (3). All revenues raised by Act 685 are legislatively

designated as special revenues to be exclusively used for road construction and repair by the State and its cities and counties. Ark. Stat. Ann. §75-817.3 (m). This non-discriminatory, special revenue "user fee" tax package is also being challenged by these appellants in *American Trucking Associations, Inc. v. Gray*, appeal pending No. 86-358 (U.S. September 3, 1986).

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No. 86-357

In the Supreme Court of the United States

October Term, 1986

American Trucking Associations, Inc., et al., ... *Appellants*

V.

James I. Scheiner, Secretary of the Department of Revenue, et al., ... *Appellees*

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

BRIEF OF THE STATE OF ARKANSAS, *AMICUS CURIAE*, IN SUPPORT OF APPELLEE

STATEMENT

The appellants in their brief at 34 - 35, n. 14, have specifically tied the second prong of their argument in *Scheiner* with their still pending suit in *ATA v. Gray*, No. 86-358, appeal pending (U.S. Sept. 3, 1986). This link has been echoed in the brief filed by Amici Curiae Yellow Freight System, Inc. et al., at 7 - 9 and 13, as well as the brief filed by the State of Oklahoma. Because in some respects the issues *are* similar and because the appellants have chosen to explicitly implicate the Arkansas tax package, some explanation of that package is required.

The thrust of the challenge in *ATA v. Gray, supra*, like the second argument in *Scheiner* is an allegation of a "discriminatory impact" of the Act 685 tax package be-

tween Arkansas registered motor vehicles and non-Arkansas registered motor vehicles. In order to assess this challenge (and see, in short, the artificiality of this dichotomy) the Court needs some basic facts concerning both modern truck registration laws and the way in which the challenged Arkansas tax package actually operates within the existing registration system. The Court also needs to understand, at the front end, that under the challenged Arkansas law *it makes absolutely no difference in either the options for payment available to a carrier or the tax liability of any individual tax payer whether a motor vehicle is base-plated in Arkansas or base-plated elsewhere.*

A. Truck Registration, Reciprocity, and the IRP:

Arkansas imposes a general statutory requirement that all motor vehicles be registered in this state in order to travel on its highways. Ark. Stat. Ann. §§75-809 (Supp. 1985), 75-131, 132 (Repl. 1979). Registration includes payment of a statutory fee based upon the type of vehicle, as well as its declared gross weight. Ark. Stat. Ann. §75-201 (Repl. 1979). Since 1945, however, Arkansas officials have been authorized to enter into reciprocal agreements with other states to authorize the travel of non-Arkansas "plated" vehicles. Ark. Stat. Ann. §§75-250, 251 (Repl. 1979).

These agreements fall into two types.

The older of these two kinds of agreements are known as "bilateral reciprocity agreements". The essence of such an agreement is that Arkansas agrees to allow, say, trucks base-plated in Rhode Island to travel in Arkansas without paying the Arkansas fee or securing an Arkansas plate, so long as Rhode Island accords reciprocal privileges to Arkansas base-plated vehicles. No money is exchanged. Arkansas currently has bilateral reciprocity with 15 states, primarily those in the Northeast.

All the remaining states, including all states contiguous with Arkansas, are, like Arkansas, members of the International Registration Plan. The IRP is an informal compact among its participating states, two provisions of which are important to an understanding of the issues here. First, registration fees are apportioned among member jurisdictions based upon the percentage of any carrier's miles generated in each state. [1] In other words, suppose a carrier will travel in Tennessee, Missouri and Arkansas. If he registers his vehicle in Tennessee (his "Base" state) he purchases a Tennessee IRP apportioned plate and declares on the appropriate form that he will travel for example, 25% of his miles in Arkansas, 25% in Tennessee, and 50% in Missouri. His license fee in Tennessee will be the sum of 25% of the statutory Tennessee fee, 25% of the Arkansas fee, and 50% of the Missouri fee. He pays this to Tennessee after which Tennessee then forwards the respective amounts to Arkansas and Missouri. The second critical provision of the IRP is related to this: where a motor vehicle is base-plated makes no difference in the amount any other state receives in registration fees; therefore, a carrier is allowed to base-plate in any IRP jurisdiction in which he has an office with a street address to which records can be

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IRP § III A States: "A. The registration fee for apportionable vehicles shall be determined as follows: (1) Divide the In-jurisdiction miles by total miles generated during the preceding year. (2) Determine the total fees required under the laws of each jurisdiction for full registration of each vehicle at the regular annual or applicable fees, or for the unexpired portion of the registration year. (3) Multiply the sum obtained under Paragraph 2 of this section by the quotient obtained under Paragraph 1 of this section" International Registration Plan, with Official Interpretations, American Association of Motor Vehicle Administrators, (Rev. 1981), at 9. IRP manual introduced as PX. 6 in *Gray v. ATA*, No. 86-358, appeal pending (U.S. Sept. 3, 1986).

brought and in which he generates any mileage at all with any of his vehicles. [2]

B. Taxes Imposed Under Act 685 of 1983:

After the gross weight limit in Arkansas was raised from 73,280 pounds to 80,000, the legislature imposed two taxes on this new weight category. First, all of those vehicles which were previously required to pay a registration fee to Arkansas are required to calculate that fee for this new class of vehicles "at a maximum registration fee for 68,001 to 73,280 pounds, as provided in Subsection (7) of Subsection (c) of Section 24 . . . ". Ark. Stat. §75-817.2 (Supp. 1985). Second, the Act also imposes the Highway Use Equalization Tax of Ark. Stat. Ann. §75-817.3 (Supp. 1985), payable generally at $ .05 a mile up to a maximum payment of $175.00. The challenged HUE tax portion of the taxes levied by Act 685 of 1983, Ark. Stat. Ann. §75-817.3 (Supp. 1985), can be analyzed as a flat rate tax of $175.00 with a payment option for carriers traveling less than 3500 miles in

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IRP §II (C) (1) states: "C. 1. 'Base Jurisdiction' means, for purposes of fleet registration, the jurisdiction where the registrant has an established place of business, where mileage is accrued by the fleet and where operational records of such fleet can be made available in accordance with the provisions of Article XIV,A(2) . . . Although 'an established place of business' is not defined, it is construed to mean . . . a physical structure owned, leased or rented by the fleet registrant the location which is designated by street number or road location, and which is open during normal business hours, and in which are located: 1) a telephone or telephones publicly listed in the name of the fleet registrant, 2) a person or persons conducting the fleet registrant's business, and, 3) the operational records of the fleet (unless such records can be made available in accordance with the provisions of Article XIV.A.2) A question has arisen whether all vehicles of a fleet must accrue miles with the jurisdiction chosen as 'base'. If this interpretation were adopted, the registrant would be forced to make certain that every vehicle of a fleet traveled some of its miles in the 'base' each year. This requirement would contravene the purpose of granting operational flexibility. The Plan is construed broadly to require only the accrual of miles by the fleet as a whole; each vehicle need not individually enter the base jurisdiction." Id., at 5.

Arkansas that provides them with a dollar and cents tax savings upon payment at a rate of a nickle a mile.

For analytical purposes, there are really three groupings of motor vehicles from which payment is exacted.

First, wholly intrastate Arkansas carriers with a declared gross weight of over 73,280 pay a flat registration fee of $1,044.00 (See, Ark. Stat. Ann. §75-201 (c) (7) (Repl. 1979)) plus a flat $175.00 HUE tax imposed by Ark. Stat. Ann. §75-817.3 (f) (2). Intrastate carriers do not have the five cent/mile option because they are not subject to apportioned registration under the International Registration Plan and hence do not report their mileage to anyone.

Second, motor vehicles base-registered in any IRP signatory state pay an apportioned registration fee to Arkansas through the International Registration Plan. As stated above the fees under this apportioned registration system are based not on actual miles, but on the percentage of miles traveled in this state. For example, a heavy motor vehicle traveling 10% of its miles in Arkansas will pay a registration fee of 10% of $1,044.00 or $104.40. In addition such a carrier will pay the HUE tax at a rate of five cents/mile to a maximum of $175.00 or purchase individual trip permits at a rate of $8.00/hundred miles. Ark. Stat. Ann. §75-817.3 (f), (i) (Supp. 1985).

Third, non-IRP registered vehicles secure authority to travel in Arkansas for registration fee purposes through "reciprocity". Such non-Arkansas, non-IRP base registered vehicles paid no registration fee in this state prior to the enactment of Act 685 and continue to pay none. See Ark. Stat. Ann. §75-817.2 and Ark. Stat. Ann. §75-817.3 (b) (Repl. 1985). They do however pay a HUE tax (if they declare through the qualification process a gross weight in Arkansas in excess of 73,280 pounds) of five cents/mile to a maximum of $175.00 or purchase individual trip permits at a rate of $8.00/hundred miles.

ARGUMENT

A NONDISCRIMINATORY PARTIAL FLAT RATE TAX AS PART OF A STATES MIX OF HIGHWAY USER FEES DOES NOT VIOLATE THE COMMERCE CLAUSE.

A. As A Practical Matter This Litigation Represents An Attempt By The Largest Truck Companies To Preserve Their Ability To Exploit Existing Tax Subsidies.

The trucking industry is only possible (and profitable) because of the enormous continuing public investment in highway construction and maintenance. Because of the "wear and tear" caused by their weights, the heavy haul truck is the predominate "consumer" of state road systems. For example, when Arkansas raised its weight limit from 73,280 pounds to 80,000 pounds the increased weight resulted in an *additional* $53,000,000.00 annually in repairs on Arkansas' Interstate and primary road system alone.[3] Any system of user fee taxation, then, will (and should) be a significant cost to the industry and the manner of allocating these fees will inevitably impact the industry's structure and development.

In attacking the *concept* of facially non-discriminatory flat rate fees, as *any* part of the permissible mix of user fee taxes, the appellants and their amicus supporters extol the traditional two-tier tax system of registration fees and motor fuel taxes. Yet the record in *American Trucking Associations, Inc. v. Gray*, appeal pending No. 83-358 (U.S. Sept. 3, 1986), demonstrates that this system, instead of being "tax neutral", has inevitably subsidized the growth of huge trucking firms at the expense of owner/operator and smaller competitors: operating "flexibility" can be

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3 This was the damage figure relied upon by the Court in setting the proposed bond on the request for a preliminary injunction. See, *American Trucking Associations v. Gray*, 280 Ark. 258, 657 S.W.2d 207 (1983).

purchased cheaply and is then "tax subsidized" enough to pay for the enormous overhead of operating a Yellow Freight or a North American Van Lines.

First of all by adhering to the traditional two tiered system the appellants under cut their argument that their real concern is any "flat rate" fee. All states have a registration fee [4] and registration fees *are* flat rate taxes, even registration fees that are apportioned through the International Registration Plan. Because the resulting fee is determined by the percentage of miles in a given jurisdiction, not the actual miles, the fee is merely a flat rate tax with inherently limited potential as a revenue raiser. (The political disincentive of raising registration fees on paper, say $10.00 to get a $1.00 back in the State treasury is rather obvious).

Moreover, it is clear that in actual operation, the IRP apportioned licensed fee (discussed in the Statement) is a boon to the heavy interstate hauler with a low percentage or miles in any single state. Take, for example, four carriers, each hauling 5,000 miles in Arkansas. The first is a wholly intrastate carrier who pays $1,044.00 for his Arkansas "J" tag, or around 20 cents/mile. Ark. Stat. Ann. §75-201 (Repl. 1980). The second is licensed under the IRP and travels 5,000 miles in Arkansas and 5,000 in another state he pays $522 to Arkansas for his license, or 10 cents/mile. The third is a coast-to-coast IRP carrier who travels 50,000 miles a year, 5,000 of which is in Arkansas he pays only $104 for his license fee or 2 cents/mile. The fourth is a non-IRP licensee who is licensed in a state with a reciprocity agreement in Arkansas and he pays absolutely no license fee in this state.

An example of the heavy interstate hauler is the Transcon Lines Inc., a plaintiff/appellant in *ATA v. Gray*, No. 86-358, who because of sheer size is able to operate

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Polk Motor Vehicle Registration Manual, CR.L. Polk Co. April (1986).

"pony express" style 24 hours a day from coast-to-coast. [5] Such a company can obviously churn out two or three times the miles (and therefore pay one half to one third of the registration fee per mile) of the hardest working owner/operator.

Second, sheer numbers of trucks, and the "operational flexibility" those numbers allow (discussed at length by the Amici Yellow Freight, et. al. in their brief at 4 - 6) means that the largest companies can travel more full, more of the time, than their smaller, less flexible competitors. There are obviously some *real* efficiencies in that, but there are also some *real* subsidies to it under the motor fuel tax. The record in *ATA v. Gray, supra* reflected a unanimous engineering judgment that motor vehicle wear and tear on the highways increases at an increasing rate as a motor vehicle's weight increases. [6] Yet motor fuel efficiency (a key determinant in the payment of any motor fuel tax) decreases at a decreasing rate as weight increases. The result is a subsidy of the highest weight vehicles by those which are lighter, a subsidy that will only increase with

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"The Buffalo driver takes his rest while the Indianapolis driver takes the same power unit hooked to the same trailer to Kirland, Missouri where he would rest, the Kirkland driver takes it to Oklahoma City where he rests, and the Oklahoma City driver takes it to Tecumcari, New Mexico where he rests, the Tecumcari takes it to Winslow where he rests, the Winslow driver takes it to Barstow where he rests and then Barstow driver takes it to its ultimate destination, being Los Angeles." *Gray*, T. 1561.

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Both the appellant's expert witness, Ralph Johnson and the appelee's witness, Assistant Chief Engineer Charles Venable concurred that this is the accepted significance among highway engineers of the empirical AASHTO road test.

increasing reliance on the motor fuel tax in a state's mix of highway user fees. [7]

The largest segments of the industry have grown larger under this system of subsidy. (See, discussion of the history of the industry at appellant's brief 43 - 45 and descriptions of Amici Yellow Freight, et. al., operations in their brief at 2 - 5). The existing tax subsidy pays the overhead and flexibility can be purchased cheap. The real challenge to the industry giants of including a *partial* flat rate fee (and both the Arkansas HUE tax and the Pennsylvania axle tax give a dollars and cents tax break to the casual user) as even *part* of the mix of user fees, is that for the first time since the inauguration of reciprocity and the IRP, buying that flexibility becomes a little more expensive and the largest companies may lose a little of their ability to exploit their otherwise, subsidized competitive edge.

This is the real fight involved in the litigation.

A nondiscriminatory flat rate tax, as long as it is not disproportionate in amount (see discussion below at p. 13, 14) should not be unconstitutional. Such taxes do not differentiate between segments of the industry based on place of origin. c.f., *Lewis v. B. T. Inv. Managers, Inc.*, 447 U.S. 27 (1980). To enshrine cheap "operational flexibility" as a constitutional imperative will merely secure in concrete (and asphalt) a relative competitive advantage the largest companies can exploit over the low overhead owner/operator. This kind of favoring of one segment of the

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U.S. Dept. of Transportation, *Vol. 1, Main Text State Highway Cost Allocation Guide*, (October, 1984), at III-11: "Fuel tax contributions per vehicle mile increase with vehicle weight because fuel efficiency declines with weight, but these contributions increase much less rapidly than responsiblities. Therefore a single rate fuel charge, planned to match the lightest vehicle's responsibility, would not achieve the correct revenues for the heavier vehicles."

interstate market over another is certainly not required. In fact this Court has recently declared that it "could not accept . . . [the] underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1980).

B. The Appellant's Average Cost Per Mile Figures Are a Red Herring.

One indication that this litigation is not really about local/non-local discrimination is that the appellants' evidentiary centerpiece of an *average* cost-per-mile discrepancy between locally base-registered and non-locally base-registered carriers under non-discriminatory flat rate taxes is truly an artificial dichotomy, a red herring. It simply is not true, as the appellant's assert in their brief (at 48) that the evidence of their statistical survey shows that flat highway taxes work to favor intrastate over interstate commerce and in-state over out of state trucks.

This is clearly not a fight between interstate and intrastate commerce. As Arkansas noted in its response to the Jurisdictional statement almost *all* trucks today travel in interstate commerce: of the 156 carriers noted by the appellants as being "Arkansas based" trucks, at least 138 were *also* interstate carriers. [8]

In fact, most of the vehicles on both surveys in *ATA v. Gray* and presumably in *ATA v. Scheiner*, are base-registered on an apportioned basis under the International Registration Plan. The significance of this is that, under the liberal licensing criteria of IRP "base jurisdiction", where a vehicle is licensed is no real indicator of whether he is domestic or non-domestic for purposes of establishing parochial discrimination under the Interstate Commerce Clause. Many, if not most, IRP carriers operate in a

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Gray, T. 1995.

multiplicity of jurisdictions and can and do conveniently register in several of them. Individual trucks may be base-plated in a state in which they never even travel. See, note 2.

The record in *ATA v. Gray, supra*, is full of examples of how fluid the situation is. For example, Mr. Paul Martinson testified that the Plaintiff, Diamond Transportation system, Inc., is a Wisconsin Corporation with headquarters in Racine, Wisconsin, but licenses its vehicles in Oklahoma. Many carriers license some vehicles in Arkansas and some elsewhere, thus appearing on both lists. Even Arkansas Best Freight licenses its vehicles in Illilnois. [9] Doug Hughes, the ATA official who coordinated the survey information, admitted that his lists ignore corporate citizenship and the probably more important indicator of "home office" domicile. The result, he said, is "Arkansas" companies which license in other states show up on the "foreign" list and foreign companies that license in Arkansas show up as Arkansas registrants. [10]

The law is clear that " . . . [o]ne of the fundamental principles of Commerce Clause jurisprudence is that no State consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.' *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959). See *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977)." *Maryland v. Louisiana*, 451 U.S. 725, 755 (1981). But the record in these cases is clear that IRP registered interstate carriers may not be "local" (in that sense) anywhere. At the very least, the place where they base register has very little necessary connection with where that "locality" may be.

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Gray, PX 45-46.

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Gray, T. 439.

Moreover, whether a particular carrier is Arkansas base-registered or non-Arkansas base-registered *makes absolutely no difference in the amount of HUE tax he will ever pay.* This is uncontested by the appellants and is a hallmark of any facially non-discriminatory flat rate tax. Unlike the decision of where to locate a manufacturing plant in view of the West Virginia gross receipts tax credit [*Armco v. Hardesty*, 467 U.S. 638 (1984)], or where to ship exported goods under the New York franchise tax credit [*Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984)], or where to trade stock in view of the New York State transfer tax [*Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977)], the decision of where to base-register a motor vehicle in view of the Arkansas or Pennsylvania tax scheme remains "tax neutral." Thus, in terms of those traditional commerce clause concepts guaranteeing "an area of free trade among the several states . . . " *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 402 (1984), the statistical claims propounded through the appellant's survey data are essentially irrelevant.

What the ATA survey purports to show is something about the motor carriers' "actual operating costs." An additional problem with the appellant's survey results, however, is that by isolating only the Arkansas HUE or Pennsylvania marker fee portion of the taxes borne by heavy trucks, the survey is simply not probative of anything under an "actuality of operation" test. As this Court recently stated: "A state tax must be assessed in light of its actual effect considered in conjunction with other provisions of a State's tax scheme. 'In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.' [Citations omitted]" *Maryland v. Louisiana*, 451 U.S. 725, 756 (1981). This need to look further than at a single tax is particularly pressing when the challenged Act itself (as in Arkansas' Act 685 of 1983) levied both the HUE tax and a registration fee on all motor vehicles with a declared gross

weight in excess of 73,280 pounds. Ark. Stat. Ann. §§75-817.2, 75-817.3 (Supp. 1985).

An auditor for the Arkansas Highway Department calculated the registration fee per mile for both Arkansas-based and non-Arkansas-based carriers appearing on the surveys introduced in *Gray* chosen at random. She found a spread of between .84 to 19.88 cents per mile for the Arkansas base-registered carriers and between .55 to 1.8 cents per mile for the non-Arkansas base-registered trucks. Again, the survey data submitted by the appellants tells nothing about the total tax burden borne by the surveyed carriers and evidence in the record established that, without this information, the survey cannot be probative of the "actuality of operation."

The appellants have responded to this attack on their survey results by treating it as an improper application of the compensatory tax doctrine. (appellants' brief at 22-24). Yet this change neatly misses the point: it is a *given* in analyzing a mix of legislatively designated special revenue "user" fees that the whole mix is payment for the privilege of "consuming" a state's road system. This consumption will vary based on both *actual miles and actual weight* of the vehicle. Anything less sophisticated than a survey showing total actual costs in relation to actual weight and mileage (with the additional knowledge that road "wear and tear" goes up at an increasing rate as weight increases) will not be probative in assessing the "actuality of operation." The difficulty in presenting this kind of proof is why the traditional standards of special revenue taxation have allowed the collection mix to rest on a wide variety of bases, so long as the amount charged is not disproportionate to the privilege granted.

C. A Facially Non-Discriminatory User Fee Is Valid Under Capitol Greyhound v. Brice, 339, U.S. 542 (1950) And Massachusetts v. United States, 435 U.S. 444 (1978).

The appellants admit that the Pennsylvania axle tax and the old marker fee were facially neutral. But, in their attempt to develop a substantial constitutional question, they skirt the essential correlary: It makes absolutely no difference in the actual tax liability of any individual carrier what base-plating may have been chosen.

It is of course recognized that any flat rate vehicle tax will inevitably result in different payments per mile based upon the number of miles traveled in the taxing jurisdiction. This will be true even under a tax like that challenged here in which this result is ameliorated somewhat by the refund procedure. Although tangential reference is made in the appellant's brief to numerous contemporary commerce clause cases, the sole line of doctrinal support that this feature renders a flat rate tax unconstitutional is found in this Court's handling of the "drummer cases" culminating in *Nippert v. Richmond*, 327 U.S. 416 (1946); see also *Robbins v. Shelby County Taxing District*, 120 U.S. 489 (1887); *Best and Company v. Maxwell*, 311 U.S. 454 (1940).

Yet in citing this line of authority [and identifying with it the bus tax overturned in *Sprout v. South Bend*, 277 U.S. 163 (1928)], the appellants confront a salient distinguishing feature: facially neutral taxes that are special, not general, revenue levies have long been upheld, even when they are completely flat rate fees.

The theoretical foundation for such legitimacy is that the tax is not levied on actual use of the roads, but upon the privilege of making such use. "The fee is for the privilege for a use as extensive as the carrier wills that it shall be. There is nothing unreasonable or oppressive in a burden so imposed . . . One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he might." *Aero Mayflower Transit Co. v. Georgia Public Service Commission*, 295 U.S. 285, 289 (1935).

In the case of *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950) decided four years after *Nippert*, *supra*, the

Court was unanimous in its support of non-mileage based motor vehicle taxes. Following a lengthy review, the majority declared "it is clearly within the discretion of the State to determine whether the compensation for the use of its highways by automobiles shall be determined by way of a fee, payable annually, or by a toll based on mileage or otherwise". 339 U.S. 542, at 544-545. Even in the dissent (which revolved around the incidence of the tax being on a vehicle's purchase rather than a right to use the roads) Justice Frankfurter favorably reviewed the relevant case law:

> Again, if the State makes clear by disposition of the tax proceeds or by statutory declaration that the tax is levied to secure compensation for road use, the tax classification will be sustained if it may fairly be attributed to the privilege of road use, as distinguished from actual use. Compare *Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183 (no allocation of proceeds) with *Clark v. Poor*, 724 U.S. 554 (allocation); see Appendix, post, p. 561. Thus, mileage may be ignored and an annual tax may be based on horespower, *Hendrick v. Maryland*, 235 U.S. 160; on carrying capacity, *Clark v. Poor*, 274 U.S. 554, and *Hicklin v. Coney*, 290 U.S. 169; and on manufacturer's rated capacity, *Dixie Ohio Express Co. v. State Revenue Comm'n*, 306 U.S. 72. And the Court has upheld flat fees imposed without regard to size or weight factors, *Aero Mayflower Transit Co. v. Georgia Public Service Comm'n*, 295 U.S. 285; *Morf v. Bingaman*, 298 U.S. 407; *Clark v. Paul Gray, Inc.*, 306 U.S. 583; *Aero Mayflower Transit Co. v. Board of Railroad Comm'rs*, 332 U.S. 495.

339 U.S. at 551.

The Appellants now insist that this whole body of case law has been rendered moot sub silentio by the Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Of course, there is no inconsistency between the result in the *Capitol Greyhound, supra*, line of cases and the fourth prong of the *Brady* test when the "services provided by the

State" are viewed as the opportunity to haul an unlimited number of miles. In any case, the Supreme Court has specifically reaffirmed the validity of these cases in a post-Brady decision. In *Massachusetts v. United States*, 435 U.S. 444 (1978) the Court validated a flat-rate federal airport tax by analogy to the "accepted" status of flat rate motor vehicle taxes:

> Having established that taxes that operate as user fees may constitutionally be applied to the States, we turn to consider the Commonwealth's argument that §4491 should not be treated as a user fee because the amount of the tax is a flat annual fee and hence is not directly related to the degree of use of the airways. This argument has been confronted and rejected in analogous contexts. *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 70 S.Ct. 806, 94 L.Ed. 1053 (1950), is illustrative. There the Court rejected an attack under the Commerce Clause on an annual Maryland highway tax of "2% upon the fair market value of motor vehicles used in interstate Commerce." The carrier argued that the correlation between the tax and use was not sufficiently precise to sustain the tax as a valid user charge. Noting that the tax "should be judged by the result, not its formula, and must stand unless proven to be unreasonable in amount for the privilege granted," id., at 545, 70 S.Ct., at 808, the Court rejected the carrier's argument:
>
> Complete fairness would require that a state tax formula vary with every factor affecting appropriate compensation for road use. These factors, like those relevant in considering the constitutionality of other state taxes, are so countless that we must be content with 'rough approximation rather than precision.' . . . Each additional factor adds to administrative burdens of enforcement, which fall alike on taxpayers and government. We have recognized that such burdens may be sufficient to justify states in ignoring even such a key factor as mileage, although the result may be a tax which on its face appears to bear with unequal

> weight upon different carriers . . . Upon this type of reasoning rests our general rule that taxes like that of Maryland here are valid unless the amount is shown to be in excess of fair compensation for the privilege of using state roads." Id. at 546-547, 70 S.Ct., at 809 [Citations and footnotes omitted.]
>
> See also, *Aero Mayflower Transit Co. v. Board of Railroad Comm'rs.*, 332 U.S. 495, 68 S.Ct. 167, 92 L.Ed. 99 (1947).

430 U.S. 444, 463 (1978).

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981), cited by the appellant, does contain dicta that any proportional tax meets the fourth prong of the Complete Auto test. Even this dicta however does not purport to reach as far as its converse, i.e. that no flat rate tax ever can meet this test. In any event, *Commonwealth Edison, supra*, explicitly limits the application of its analysis of the fourth prong of Complete Auto to general revenue taxes:

> The Montana Supreme Court held that the coal severance tax is "imposed for the general support of the government" 615 P.2d, at 856, and we have no reason to question his characterization of the Montana tax as a general revenue tax. Consequently, in reviewing appellant's contentions, we put to one side those cases in which the Court reviewed challenges to "user" fees or "taxes" that were designed and defended as a specific charge imposed by the State for the use of state-owned or state-provided transportation or other facilities and services.

Commonwealth Edison Co. v. Montana, 453 U.S. 609, 621 (1981).

The appellants press for review of this settled doctrine claiming a large volume of Commerce Clause litigation and inconsistent judicial decisions. The truth is that the only three State Supreme Courts have been confronted with the

validity of facially non-discriminatory motor vehicle special revenue "user" taxes in which this sort of inherent disparity in cost per mile played a part in the analysis of the flat rate aspect of the challenged tax: the Maryland registration fee, Md. Transp. Code Ann §13-423(a) (1984); the Arkansas Highway Use Equalization Tax, Ark. Stat. Ann. §75-817.3 (Supp. 1985); and the Pennsylvania marker fee and axle tax, Pa. Cons. Stat. Ann. tit. 75 §§2102 (Purdon 1981) and 9901 et. seq. (Purdon Supp. 1986). In all three instances the courts upheld the tax relying upon that clear line of authority emanating from this Court in *Aero Mayflower Co. v. Georgia Public Ser. Comm'n*, 295 U.S. 285 (1935) through *Aero Mayflower Transit Co. v. Board of Railroad Comm'rs.*, 332 U.S. 495 (1947) and *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950) culminating in *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), and *Massachusetts v. United States*, 435 U.S. 444 (1978). See, *American Trucking Associations Inc. v. Goldstein*, 483 A.2d 47 (Md. 1984); *American Trucking Associations Inc., v. Gray*, 288 Ark. 488, 707 S.W.2d 259 (1986); *American Trucking Associations, Inc. v. Scheiner*, 509 A.2d 838 (Pa. 1986).

D. No Showing Of Manifestly Disproportionate Amount.

Throughout this litigation, as well as in *ATA v. Gray*, No. 86-358, the appellants have not even attempted to meet the established test for challenging state imposed highway user fees. Such levies have been upheld "unless the amount is shown to be in excess of fair compensation for the privilege of using state roads". *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 546-547 (1950), cited in *Massachusetts v. United States*, 430 U.S. 444, 463 (1978) [emphasis added]. Moreover, the burden of asserting the requisite "manifest disproportion" clearly rests on anyone challenging the validity of the tax. *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939; *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 548 (1950).

For example no taxpayer is assessed more than $175.00 under the Arkansas HUE tax [Ark. Stat. Ann. §75-817.2 (Suppl. 1985)] and since this kind of challenge is really mounted on behalf of the mileage option payees, the actual dollars and cents charge being questioned is below that "high dollar" figure. Yet even $175.00 is well within the constant dollar amount of fees previously held valid by the Court. For example, the twenty five "1935 dollars" approved in *Aero Mayflower Transit Co. v. Georgia Public Service Commission*, 295 U.S. 285 (1935) equates with $186.03 in 1983 dollars; [11] yet in 1935 the Georgia truck weight limit was only 12,500 pounds [12] compared to Arkansas' current 80,000 pounds. In short, the approved fee in 1935 was for more money and substantially less privilege. Similarly, in 1950 the Capitol Greyhounds Company challenged Maryland's levies of $505.17, $580.00, and $732.55 [13]; an equivalent 1983 flat rate charge would have been $2,090.00, $2,400.00, and $3,542.00, [14] respectively.

Still, the record in *ATA v. Gray, supra*, does reflect that the plaintiff/appellants may not have attempted to show "excessive" charges because they knew such proof could not be found.

Leroy Mallory, Director of Transportation for Tyler Pipe Industries (one of the name-plaintiff/appellants in this litigation) testified that the actual cost of operating one of his vehicles was $1.00/mile. [15] This is the only cost data in

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The Consumer Price Index (1967 = 100) was 40.1 in 1935 and 298.4 in 1983. U.S. Dept. of Labor, Handbook of Labor Statistics 1975 - Reference Edition and Consumer Price Index U.S. City Average 1975 - 1986.

12

Ga. L., 1931. (Ex. Sess.) p. 114.

13

Capitol Greyhound Lines v. Brice, 339 U.S. 542, 546 (1950).

14

The Consumer Price Index in 1950 was 72.1; in 1983 the CPI was 298.4.

15

Gray T. 1508.

the record. In 1983 the Arkansas legislature raised its gross weight limit from 73,280 pounds to 80,000 pounds, which allowed truck carrying capacity to increase by 6500 pounds or some 14-16%. This percentage is computed by comparing the increase with the previous freight capacity of 43,000 pounds. [16] Since the HUE tax was imposed to pay for this increased weight limit, an (at most) 5% increase in costs/mile (assuming the nickle a mile option, the highest cost/mile paid by anyone) can not be considered excessive for a 14-16% increase in load capacity.

This favorable individual carrier cost/benefit analysis carries through on an industry wide basis.

Ralph Johnson, a transportation engineer and consultant who was called as a witness by the appellants themselves, had prepared a study, finding that in 1982 the industry benefit from an increase in allowable gross weight from 73,280 pounds to 80,000 in Arkansas would have amounted to over $115 million a year. [17] Charles Venable, an engineer for the State, testified that the increased weight would result in an additional $53 million in needed repairs annually on Arkansas' interstate and primary system alone. [This was the damage figure relied upon by the trial court in setting the proposed bond on the request for a preliminary injunction. See, *American Trucking Association Inc. v. Gray*, 280 Ark. 258, 657 S.W.2d 207 (1983)]. The Highway Use Equalization Tax is designed to raise a little over $20 million a year. Thus, on an industry wide basis the funds to

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Empty five axle vehicles weigh 28,000-31,000 pounds. Therefore, under the pre-1983 Arkansas weight limit of 73,280 pounds, freight capacity would have been around 43,000 pounds. *Gray*, T. 2308.

17

The actual reported savings was $115.8 million annually. DX.2. "Costs and Savings Associated with Changes In Weight Limits on Arkansas' Highways", Counseltrans Inc., (Rockville, Md. Oct. 1982) at 8. Ralph Johnson called by the appellants was author of the report and president of Counseltrans, Inc.

be raised are not disproportionate to either the private benefits secured or the public costs incurred.

The structure and amount of the Pennsylvania axle tax is not so dissimilar that this evidence would not be equally probative here.

E. Retaliatory Taxes Are Unconstitutional And Can Be Struck Down On Their Own Merits.

One side issue remains.

Part of the appellant's "cumulative burden" argument is that taxes like the Pennsylvania axle tax and the Arkansas HUE tax, though facially neutral themselves, have engendered the imposition of discriminatory "retaliatory taxes." An example of such taxation is that imposed by the State of Oklahoma. (See its Amicus Brief in support of the appellant.) Of course one hallmark of "mirror" retaliatory taxation is that it is facially discriminatory. If the industry really wants to cure this "unseemly economic conflict", it should do so with a direct attack on the retaliatory taxes themselves, something the apellants have avoided. The industry in fact promotes the threat of mirror retaliation as a legislative weapon to keep non-discriminatory "third" structure taxes from being imposed in other states. This Court has had little difficulty in dismissing State's attempts to use such unconstitutional means under a guise of pursuing "free trade" ends. *Great Atlantic and Pacific Tea Company v. Cottrell*, 424 U.S. 366, 379 (1976).

SUMMARY

This Court should hold that States can continue to use a partial flat rate tax as part of its mix of highway user fees.

Respectfully submitted,

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APPENDIX

ARK. STAT. ANN.

75-131. Registration and certificate of title required.—It shall be a misdemeanor for any person to drive or move or for an owner knowingly to permit to be driven or moved upon any highway any vehicle of a type required to be registered hereunder which is not registered or for which a certificate of title has not been issued or applied for or for which the appropriate fee has not been paid when and as required hereunder, except that when application accompanied by proper fee has been made for registration and certificate of title for a vehicle it may be operated temporarily pending complete registration upon displaying a duplicate application duly verified or other evidence of such application or otherwise under rules and regulations promulgated by the commissioner.

75-250. Commission to make reciprocal agreements relating to operation of motor vehicles—Members.—An ex-officio Commission, composed of the Commissioner of Revenues, who shall serve as Chairman, the Director of Highways and the Chairman of the Public Service Commission [Arkansas Transportation Commission], is hereby established for the purpose of representing the State of Arkansas in the matter of making reciprocal agreements relating to the operation of motor vehicles.

75-251. Reciprocal agreements as to allocation and apportionment of registration pursuant to formula—Safety rules unaffected.—The Commission is hereby authorized to negotiate and consummate reciprocal agreements with the duly authorized officials or representatives of any state or the several states of the United States, whereby residents of such other state or states who operate commercial motor vehicles may allocate and apportion the registration of such commercial motor vehicles in accordance with any formula mutually agreed upon between the Commission and the

representatives or officials of such state or states. Provided, residents of this State are granted the same allocation and apportionment privileges for commercial motor vehicles' registration in such other state or states. Also provided, that nothing in this Act shall be construed as relieving any motor vehicle owner or operator from complying with all laws, rules and regulations pertaining to safety of operation of motor vehicles and the highway maximum weight standards and the preservation of the highways of this State.

75-809. Registration of vehicles—Weight limitation—Brakes—Display of registered gross weight—Operation with excess weight unlawful—Federal use tax payments.—(a) The commissioner, upon registering any vehicle under the laws of this state which vehicle is designed and used primarily for the transportation of property or for the transportation of 10 or more persons, may require such information and may make such investigation or test as necessary to enable him to determine whether such vehicle may safely be operated upon the highways in compliance with all the provisions of this Act. He shall register every such vehicle for a permissible gross weight not exceeding the limitation set forth in this Act. Every such vehicle shall be equipped with brakes as required in Section 124 [§75-724] of this Act.

(b) The Commissioner shall insert in the registration card issued for every such vehicle the gross weight for which it is registered, and if it is a motor vehicle to be used for propelling other vehicles he shall separately insert the total permissible gross weight of such motor vehicle and other vehicles to be propelled by it. He may also issue a special plate with such gross weight or weights stated thereon, which shall be attached to the vehicle and displayed thereon at all times. It shall be unlawful for any person to operate any vehicle or combination of vehicles of a gross weight in excess of that for which registered by the Commissioner or in excess of the limitations set forth in this Act. Further, the Commissioner shall implement rules and

regulations issued by the United States Secretary of Transportation pertaining to federal use tax payments.

75-817. Single and tandem axle load limit . . .

(d) Subject to the limit upon the weight imposed upon the highway through any one (1) axle as set forth in subsections (a), (b) and (c) of this Section, no vehicle, or combination of vehicles, shall be operated upon the highways of this state when the gross weight is in excess of eighty thousand (80,000) pounds. Provided, that the foregoing maximum gross weights shall be applicable to vehicles, or combinations of vehicles, operated on highways in this state that are a part of the federal interstate highway system or that have been designated by the State Highway Commission as primary highways, and on all other highways in this state the maximum gross weight of any vehicles or combinations thereof shall not exceed sixty-four thousand (64,000) pounds. Provided, further, that vehicles, or any combination of vehicles, of a gross weight in excess of sixty-four thousand (64,000) pounds and not in excess of seventy-three thousand two hundred and eighty (73,280) pounds may operate upon the secondary highways of the State at a speed not in excess of forty (40) miles per hour. Vehicles, or any combination of vehicles, of a gross weight in excess of seventy-three thousand two hundred and eighty (73,280) pounds and not in excess of eighty thousand (80,000) pounds operating on the secondary highways of the state shall also be limited to a maximum speed of forty (40) miles per hour. Provided, that greater gross weights than permitted may be authorized by special permit issued by competent authority as authorized by law or lesser gross weights will be required when highways are posted.

75-817.2 Compliance with highway use equalization tax law prerequisite to operation with weight up to 80,000 pounds.

Any motor vehicle registered in Arkansas at the maximum registration fee for 68,001 to 73,280 pounds, as

provided in Subsection (7) of Subsection (C) of Section 24 [§ 75-201] of Act 65 of 1929, as amended, or any motor vehicle registered in any other state to carry in excess of 73,280 pounds, shall be authorized to operate in this State with a gross weight of up to 80,000 pounds, in accordance with Act 7 of 1983 [§§ 75-809, 75-814, 75-816—75-817], provided said vehicle complies with the appropriate Subsections of the following Section 2 [§ 75-817.3] of this Act, the Highway Use Equalization Tax Law.

75-817.3. Highway use equalization tax.

(a) As used in this Section of this Act, the following terms shall have the following meanings:

(1) "Department" means the Director of the Arkansas State Highway and Transportation Department;

(2) "Division" means the Commissioner of Revenues, Department of Finance and Administration, State of Arkansas;

(3) "Motor Vehicle", as used herein, means all cargo vehicles required to be registered for use upon the public highways of this State, designed, used or maintained primarily for the transportation of property and having a declared gross weight of 73,281 pounds or more. For the purpose hereof, truck-tractors, single unit trucks, semi-trailers and trailers operated in combination thereof shall constitute a single vehicle. The person having the use or control, or the right to the use or control of the part of such a vehicle furnishing the motive power is the highway user with respect to the entire vehicle and is accordingly subject as such to the provisions of this Section of this Act;

(3) [(4)] "Truck" includes the terms "truck" or "truck-tractor" and "semi-trailer" or "trailer" when operated in combination with a truck or truck-tractor;

(4) [(5)] "User" includes any person having the use and control or the right to the use and control, of any motor vehicle;

(5) [(6)] "Highway" includes all highways, roads, and streets of this State generally open to the use of the public as a way for vehicular traffic;

(6) [(7)] "Gross weight" means the actual weight of the truck or truck-tractor, plus the actual weight of the heaviest semi-trailer or trailer or combinations thereof with which it is to be operated in combination plus the actual weight of the heaviest load to be carried thereon.

(7) [(8)] "Arkansas Registered Vehicle" or "Arkansas Registered Truck" means a vehicle registered in Arkansas by a user who is an Arkansas resident, and bearing an Arkansas license plate.

(b) A tax is hereby imposed upon all users, as defined in Subsection (a), above, of motor vehicles, as herein defined, in compensation for the use of the highways of this State to be known as the "Highway Use Equalization Tax". Such tax shall be in addition to all other taxes now required to be paid on such vehicles except as hereinafter provided.

(c) The Highway Use Equalization Tax shall not apply to any motor vehicle whose declared gross weight, as defined in Subsection (a), above, is 73,280 pounds or less; nor to vehicles used exclusively in hauling unfinished and unprocessed farm products, forest products, clay minerals or ores, from the point of production, harvesting or severance to the point at which the same shall first undergo any processing, preparation for processing, conversion or transformation from their raw, natural or severed state; nor to vehicles used exclusively for hauling animal feed by owners of livestock or poultry for consumption by livestock or poultry owned by them; nor to any vehicle owned and operated by the United States of America or the State of Arkansas, or any political subdivision thereof.

(d) The provisions of this Section of this Act shall not apply to any motor vehicle used on an interstate trip with an origin or destination within 10 miles of the geographic boundaries of this State, provided the one-way travel distance in the State is not over 10 miles.

(e) (1) The user of every vehicle subject to this Section of this Act and which is an Arkansas registered vehicle, before operating such vehicle over the highways of this State, shall qualify such vehicle with the Division. Qualifications shall be made by application to the Division on forms to be provided by said Division. Said application may be filed with the Division at the time of registration of the vehicle.

(2) Such application shall be accompanied by payment to the Division of a fee of five dollars ($5.00), to be deposited into the Constitutional and Fiscal Agencies Fund, which shall cover the clerical cost of such qualification. Upon receipt of such application and payment of the tax as hereinafter determined, the Division shall make appropriate record of the vehicle qualified and certify such qualification on the applicant's registration certificate or a registration cab card, one of which is to be carried in the cab of the vehicle at all times. The said registration certificate or registration cab card shall, in addition to the registration information and the required certification, show the amount of tax paid for such vehicle as determined by Subsection (f) of this Section.

(f) (1) At the time of such qualification of any Arkansas registered truck subject to this Section which is registered through the International Registration Plan, the Division may fix a mileage rate in cents per mile for each truck so registered and qualified. The Division shall determine the mileage rate, utilizing the gross weight declared in the application for registration of the truck, according to the following table:

Vehicle Weight (pounds)	Mileage Rate (dollars)
73,281 – 80,000	$ .05

The tax determined under this provision for every truck subject thereto shall be in the amount of the determined mileage rate multiplied by each mile such truck is operated over the highways of this State, as reported to the Division for registration under the International Registration Plan.

(2) At the time of such qualification of any Arkansas registered truck subject to the provisions of this Section, every user not registered through the International Registration Plan shall pay, and every user registered through the International Registration Plan may elect to pay, an annual mileage tax in lieu of an amount determined by the applicable mileage rate set forth by Subsection (f) (1) of this Section. The Division shall determine such annual mileage tax by utilizing the gross weight declared in the application for registration of the truck, according to the following table:

Vehicle Weight (pounds)	Mileage Rate (dollars)
73,281 – 80,000	$175

(g) The tax, as determined by either Subsection (f) (1) or Subsection (f) (2) of this Section, shall become due and payable at the time of registration. No license shall be issued, nor operation authority granted, to any Arkansas registered user subject to the provisions of this Act until such time as the full amount of the tax determined to be due under the provisions of this Section, together with all penalties, shall have been paid.

(h) The Division is hereby authorized to collect those taxes and fees imposed by this Section upon the Arkansas registered users subject to the provisions of this Act [§§ 75-817.2, 75-817.3, 75-819(b)], to make timely deposits into the State Treasury of all such moneys collected by the

Division, and to administer the provisions of this Section as they pertain to Arkansas registered users, including the right to inspect and audit at reasonable times at any place within this State the books, records and documents of any Arkansas registered users required to pay the Highway Use Equalization Tax hereby imposed.

(i) (1) The user of any vehicle, subject to the provisions of this Section, may, in lieu of qualification in accordance with the provisions of Subsection (e) of this Section, remit to the Department either an annual mileage tax in an amount determined by Subsection (f) (2) of this Section, or pay an amount determined by the applicable mileage rate set forth in (f) (1) of this Section, or pay a trip permit fee. It is the intent of this Act that all users, subject to the provisions of this Section, must either qualify with the Division as provided in Subsection (e) of this Section and pay the appropriate taxes, or comply with the provisions of this Subsection. Provided, that, all Arkansas registered vehicles must qualify with the Division and remit such taxes to the Division. If the user elects to pay the annual mileage tax, the Department, upon application thereof and receipt of such payment, shall issue an annual mileage tax certificate to the user which shall, by the user, be affixed to the cab of such vehicle. If the user elects to pay an amount determined by the applicable mileage rate set forth in (f) (1) of this Section, the Department shall utilize the appropriate rate multiplied by each mile such vehicle was operated over the highways of this State for the preceding twelve month period based on mileage records of the user acceptable to the Department. Upon payment of such amount, the Department shall issue a certificate to the user, which shall, by the user, be affixed to the cab of such vehicles. If the user elects to utilize a trip permit, such trip permits for trucks with a gross weight of 73,281 pounds through 80,000 pounds shall be issued at a fee of eight dollars ($8.00) for each 100 miles of travel, rounded to the nearest 100 miles, whether loaded or unloaded. Said permits shall be issued by the Department in such forms as it deems appropriate.

(j) The tax provided for in this Section of this Act must be paid by the users of all applicable vehicles using the highways of this State, and no reciprocal agreement or agreement of any nature heretofore or hereafter entered into between officials of this State and those of any other State may exempt any user of such vehicles using the highways of this State from the provisions of this Section of this Act and payment of the tax levied by this Section of this Act.

(k) Any user found operating any vehicle subject to the provisions of this Section of this Act over the highways of this State without complying with this Section or without having available in or on the cab thereof the appropriate certificate or trip permit required by this Section, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of no less than two hundred dollars ($200.00) and not more than five hundred dollars ($500.00) for the first offense and of no less than five hundred dollars ($500.00) and not more than one thousand dollars ($1,000.00) for each subsequent offense.

(l) This Section of this Act shall be liberally construed to effectuate the purposes thereof.

(m) All fees, taxes, penalties and interest collected under the provisions of this Section of this Act not specifically classified as "Constitutional and Fiscal Agencies Funds" shall be classified as "special revenues" and shall be deposited in the State Treasury, and the net amount thereof shall be transferred by the State Treasurer on the last business day of each month: 15% of the amount thereof, to the County Aid Fund; 15% of the amount thereof, to the Municipal Aid Fund; and 70% of the amount thereof, to the State Highway Department Fund, such funds to be further disbursed in the same manner and used for the same purposes as is set out in the "Arkansas Highway Revenue Distribution Law."

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NO. 86-357

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October Term, 1986

AMERICAN TRUCKING ASSOCIATIONS,
INC, et al.

Appellants

v.

JAMES I. SCHEINER, Secretary of the
Department of Revenue, et al.

Appellees

On Appeal From The
Supreme Court of Pennsylvania

BRIEF OF THE TRANSPORTATION CABINET OF THE COMMONWEALTH OF KENTUCKY, AMICUS CURIAE, IN SUPPORT OF APPELLEES

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Pursuant to Rule 36 of this Court, the Transportation Cabinet of the Commonwealth of Kentucky, by its undersigned, respectfully submits this Brief as amicus curiae in support of the Appellees.

INTRODUCTION

A. Interest Of The Amicus.

KRS 138.660(4), enacted during the 1986 session of the Kentucky General Assembly, imposes a supplemental highway users tax (the "SHU tax") on operators of large trucks in an amount based on miles traveled in Kentucky, with a miniumum fee of $150 and a maximum fee of $200 payable annually. The SHU tax has been identified by the Appellants and others as a non-proportional or flat tax which, they claim, violates the Commerce Clause. The lead Appellant, American Trucking Associations, Inc., and several of its members have challenged the constitutionality of the SHU tax in a lawsuit filed in the Franklin Circuit Court, Franklin County, Kentucky, styled American Trucking Associations, Inc., et al. v. Commonwealth of Kentucky, et al., No. 86-CI-0464. That action has been stayed pending the disposition of this proceeding.

While there are significant differences between the Pennsylvania taxes at issue here and the SHU tax, so that the Court's holding here will not necessarily be dispositive of the Kentucky lawsuit, the outcome of this case could have a substantial impact on the SHU tax. The Appellants have argued that any tax (regardless of amount) which is not precisely proportional to highway use, and in particular any flat tax, runs afoul of the Commerce Clause. Appellants ask the Court to repudiate a long line of precedent--based upon Aero Mayflower Transit Co. v. Georgia Public Service Commission, 295 U.S. 285 (1935), and most recently reaffirmed in Massachusetts v. United States, 435 U.S. 444, 463-470 (1978)--approving of reasonable flat fees on common carriers. As set forth more fully below, such a drastic departure from existing law is unwarranted and would improperly invade the States' perogative to impose reasonable fees and

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taxes on the users of its streets and highways.

B. Kentucky's Highway Tax System.

Kentucky imposes a three-tiered tax on motor carriers using its highways. First, every motor carrier, i.e., operators of any "commercial truck or commercial tractor-trailer combination having a total of three (3) or more axles," KRS 138.655(5), must pay the same nine percent (9%) motor fuel tax paid by operators of any other vehicle when gasoline or other fuel is purchased at the service station. KRS 138.660(1).

Second, in addition to the motor fuel tax, each "heavy equipment motor carrier" must pay a surtax of two percent (2%) of the average wholesale price of gasoline and other fuels used in operation on Kentucky highways. KRS 138.660(2). "Heavy equipment motor carrier" includes all "motor carriers" except motor vehicles used to transport persons for hire. KRS 138.655(7). Both the motor fuel tax and surtax have existed since the mid-1950s.

Finally, with the enactment of the SHU tax, all motor carriers having a combined licensed weight of 60,000 pounds or more must pay an annual user fee according to the following schedule:

Annual Mileage Class	User Fee
Less than 10,000 miles	$150
10,000 to 19,999 miles	$160
20,000 to 29,999 miles	$170
30,000 to 39,999 miles	$180
40,000 miles and over	$200

The SHU tax was enacted by the Kentucky Legislature as part of an effort to remedy several fundamental problems it perceived with the cost of Kentucky's highway system and the allocation of those costs among the various classes of highway users. These problems were the subject of a study conducted in 1980-81 by the Kentucky Transportation Research Program of the College of Engineering, University of Kentucky, under the sponsorship of the Kentucky Department of Transportation and the Federal Highway Administration, United States Department of Transportation.

J. Black and J. Pigman, Allocation of Transportation Costs to Users (May 1982) (the "UK Study").

The UK Study was commissioned to determine the cost responsibility and user generated revenue for each class of vehicle traveling over Kentucky's highways. It is premised on the generally accepted notion that the cost of highway design, construction, maintenance and operation can be allocated among the various vehicle classes using public highways. For example, the ability of a vehicle to maintain constant speed is a function of the highway grade and horsepower to weight ratio. That ratio tends to decrease with increasing gross vehicle weight. Heavy vehicles thus require a flatter grade to maintain a constant speed. The UK Study recognized that the additional cost of grading and drainage necessary to provide a flatter grade should be allocated to heavy vehicles. Similarly, heavier vehicles

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require greater pavement thickness, wider shoulders, wider and sturdier bridges and more maintenance costs for upkeep of pavement and shoulders. The increased highway costs which result should also be borne by these vehicles.

The UK Study produced two significant findings. First, it showed that Kentucky was failing to provide sufficient revenue to maintain its present highway system. Second, the UK Study demonstrated a substantial disparity among vehicle types with respect to the allocation of the cost burden for Kentucky highways. Using 1980 statistics, the data compiled for the UK Study showed that automobiles and pickups paid 157% of their share of highway costs while trucks paid only 54% of their share. In particular, the heaviest trucks (those with a maximum gross weight of 62,000 pounds or more) accounted for only 52% of their share of highway costs.

The UK Study is consistent with a similar study performed in 1982 by the Federal

Highway Administration, which also concluded that the heaviest trucks were paying far less than their fair share of highway costs. Federal Highway Administration, U.S. Dept. of Transportation, Final Report on the Federal Highway Cost Allocation Study (May 1982). Congress acted on the findings of this study in 1982 and 1984 by increasing federal user charges on heavy trucks. The Kentucky Legislature similarly responded when it enacted the SHU tax in 1986. By imposing the SHU tax on the operators of the heaviest trucks, the Kentucky General Assembly sought to both alleviate the shortfall in highway revenues and ameliorate the inequitable distribution of highway costs. In short, the three-tiered taxing structure of KRS 138.660 aims to bring heavier motor carriers into greater parity with automobiles and pickups in terms of their responsibility for highway construction and maintenance costs.

The SHU tax is an important part of Kentucky's highway budget. Under existing Kentucky law, no funds from the general revenue budget can be allocated to the Transportation Cabinet for highway construction and maintenance. Instead, the Transportation Cabinet must rely for highway funding on those revenues generated directly from highway users, particularly the motor fuel and other taxes imposed by KRS 138.660. The SHU tax is one source of funds by which the General Assembly offsets the loss to the Transportation Cabinet of General Fund revenues. Estimated SHU tax revenues will total about $60 million, or ten percent (10%) of Kentucky's road fund. Significantly, these sums will be collected from a group that was previously paying only half of its share of highway costs.

SUMMARY OF ARGUMENT

This Court historically has accorded the States wide latitude in developing systems of taxation to pay the enormous

costs associated with our streets and highways. Highway use tax formulas based on many different factors have been approved even though these formulas did not precisely apportion taxes according to road use. The Court has particularly approved reasonable flat fees on motor carriers, first in Aero Mayflower Transit Co. v. Georgia Public Service Commission, 295 U.S. 285 (1935) and continuing through Massachusetts v. United States, 435 U.S. 444 (1978).

Flat fees or taxes on motor carriers are appropriate methods of raising highway funds because they are administratively convenient and, most importantly, can insure that large trucks as a group pay their fair share of highway costs. The Appellant's argument against flat fees is premised on the misguided notion that fuel taxes are the "fairest" form of highway tax. In fact, fuel tax payments do not increase proportionately with vehicle weight, and

higher fuel taxes merely continue existing imbalances in highway cost responsibility among vehicle classes. Reasonable flat fees or taxes on large trucks are a rational means of efficiently raising funds from the vehicle class causing most damage to our highways. The determination of how to raise these needed revenues is a legislative matter which should not be second-guessed by the courts.

ARGUMENT

REASONABLE FLAT FEES ON MOTOR CARRIERS, SUCH AS THOSE IMPOSED BY PENNSYLVANIA, ARE A RATIONAL MEANS OF RAISING REVENUES AND DO NOT INHERENTLY VIOLATE THE COMMERCE CLAUSE.

The Court has long cautioned against the use of the judicial power to usurp the function of the legislative branch of government. The propriety, wisdom and expediency of legislative enactments is exclusively a legislative matter. See, e.g., Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981). This is partic-

ularly true in the area of taxation: "[I]n taxation, even more than in other fields, legislatures possess the greatest freedom. . . ." Madden v. Kentucky, 309 U.S. 83, 88 (1940).

Following the principles applicable to other taxing statutes, the Court has accorded the States broad discretion in levying taxes and fees for road use by interstate and intrastate motor carriers. Over half a century ago, the Court recognized that additional taxes may be imposed upon common carriers like the Appellants because of the unique nature of their business and their frequent use of the public roadways. "Common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for such use." Clark v. Poor, 274 U.S. 554, 557 (1927). The Court has since approved a wide variety of state highway taxes, and in so doing, has established well-defined guidelines for determining the

constitutionality of these taxes. These guidelines are embodied in the four part test of Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). Highway use fees or motor fuel taxes are valid so long as they:

(1) apply to an activity having a "substantial nexus" with the taxing state;

(2) are "fairly apportioned;"

(3) do not discriminate against interstate commerce; and

(4) are "fairly related" to the services provided by the state.

Over the years, the Court has recognized that many different methods and amounts of taxation as well as classifications of highway users may satisfy the Brady test. This is true because "[t]he classification of the traffic for the purposes of regulation and fixing fees is a legislative, not a judicial, function" and will not be overturned unless it is "without

rational basis." Clark v. Paul Gray, Inc., 306 U.S. 583, 594 (1939).

In line with this reasoning, the Court has repeatedly stressed that highway use taxes may be based on any number of factors. The Court has approved taxes based on mileage, vehicle weight, tonnage-capacity, horsepower, vehicle value and gross revenues derived from operations within the State, even though these formulas may not precisely apportion taxes according to road use. See, e.g., Capitol Greyhound Lines v. Brice, 339 U.S. 542, 544 (1950); Aero Mayflower Transit Co. v. Board of R.R. Commissioners, 332 U.S. 495, 506 (1947); Morf v. Bingaman 298 U.S. 407, 412 (1936).

The discretion accorded States in the implementation of highway taxes has also extended to the imposition of reasonable flat fees. In Capitol Greyhound Lines v. Brice, supra, for example, the Court held that a state could levy a flat fee on motor carriers for the privilege of using

state highways even though "clearly a flat fee is not geared to mileage, weight or any other factor relevant in considering the fairness of compensation for road use." Id. at 545. "Rough approximation", rather than "complete fairness", was sufficient to validate the highway tax formula at issue in Capitol because of the administrative burden of enforcing a tax formula which varies "with every factor affecting appropriate compensation for road use." Id. at 546.

The Appellants have asked the Court to depart from this well-established precedent and to hold that a flat highway tax, however reasonable in amount, is inherently unconstitutional. In pressing this claim, the Appellants seek to enshrine as constitutional dogma the principle that mileage related fuel taxes are the only levies that satisfy the Brady criteria. States have a reasonable and rational basis, however, for rejecting increases in their fuel taxes in

favor of flat fees or other taxes on large trucks when considering ways to raise needed revenues.

The Appellants assert that fuel taxes are the "fairest and most economically efficient form of highway tax" (Brief for Appellants at 40). In fact, increases in fuel taxes only exacerbate existing inequities in the distribution of highway costs among highway users. Fuel tax payments actually increase very little as vehicle and axle weights rise because fuel consumption, while increasing with vehicle size and weight, does not increase proportionately with cost responsibility. Federal Highway Administration, U.S. Dept. of Transportation, Alternatives to Tax on Use of Heavy Trucks at III-4 (Jan. 1984). While the per mile cost responsibility of an 80,000 pound truck may be 15 to 16 times greater than the per mile responsibility of an automobile, the truck may use only three to four times the fuel used by the average

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passenger car for a comparable amount of travel. Thus, fuel consumption alone does not adequately reflect the cost responsibility of vehicles of different sizes and weights.

Fuel taxes can never be made to match highway cost responsibility for all vehicle classes. Higher fuel taxes merely shift the point at which trucks move from overpaying to underpaying while causing light vehicles to overpay by a greater amount. The 1984 study conducted by the federal Department of Transportation, for example, concluded that all trucks pay less than their cost responsibility with a 9 cents per gallon fuel tax. At 30 cents per gallon, only trucks weighing 58,000 pay taxes equal to their cost responsibility, while all other vehicle classes would be forced to overpay. "[E]ven a fuel tax at 30 cents a gallon, if used as the single source of highway revenues, would fail to collect adequately for cost responsibility of heavy trucks." Id.

In contrast to the fuel tax, a reasonable flat tax can allocate the increase in highway taxes to the vehicle class doing most of the damage to our highways--heavy trucks. A flat tax also eliminates very real administrative problems that can arise from other tax formulas. As the Court recognized in Massachusetts v. United States, supra, 435 U.S. at 466, precisely calculated user fees naturally increase administrative costs and, consequently, the amount of revenue needed to operate the system. While it may be theoretically possible to devise a taxing formula that would account for every factor affecting road use and cost responsibility, the age of a computer in every vehicle constantly assessing highway taxes has not yet arrived. In any event "[s]ystems of taxation need not achieve the ideal." Capitol Greyhound Lines v. Brice, supra, 339 U.S. at 552 (Frankfurter, J., dissenting). Purely theoretical or scientific conformity must

yield to the practical convenience of a particular classification of carriers for purposes of highway taxes.

Highway taxes have two goals--to raise necessary revenue, and to fairly allocate highway costs. A properly structured flat tax, when combined with registration fees and fuel taxes, can properly meet each of these goals. The determination of how these goals are to be met, however, is the province of the States and their legislatures, not the courts. "[C]ourts are not empowered to second-guess the wisdom of state policies. [R]eview is confined to the legitimacy of the purpose." Western and Southern Life Insurance Co. v. State Board of Equalization, 451 U.S. 648, 670 (1981) (emphasis in original).

As recently as 1978 in Massachusetts v. United States, 435 U.S. 444 (1978), the Court reaffirmed its long line of cases approving of reasonable flat fees on motor carriers. The States have relied on this

precedent by implementing a wide variety of highway taxes, many of which include some flat fee or tax. "[A]ny departure from the doctrine of stare decisis demands special justification." Arizona v. Rumsey, 467 U.S. 203, 212 (1984). "The stability of judicial decision, and with it respect for the authority of this Court, are not served by the precipitous overruling of multiple precedents. . . ." Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 559 (1985) (Powell, J., dissenting). The prior holdings of this Court have not hindered the growth of our interstate trucking industry and all highway taxes, including flat fees, must still meet the requirements of the Brady test. Under these circumstances, there is no justification for the drastic relief requested by the Appellants.

CONCLUSION

Taxes are never popular. Nevertheless, the highway use taxes assessed by Pennsylvania on operators of heavy trucks,

who make the highways their place of business, are hardly so onerous or irrational as to violate the Commerce Clause. The real question confronting the Court is who should pay these highway taxes. Under the guise of a Commerce Clause attack on flat fees, the trucking industry seeks judicial mandate of a highway tax system that would shift the tax burden to vehicles that already pay more than their fair share of highway costs. The Transportation Cabinet of the Commonwealth of Kentucky urges the Court to reject this approach by adhering to Aero Mayflower and its progeny and affirming the decision of the Pennsylvania Supreme Court.

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No. 86-357

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellants,

v.

JAMES I. SCHEINER, SECRETARY OF THE DEPARTMENT OF REVENUE, *et al.*,
Appellees.

On Appeal from the Supreme Court of Pennsylvania

BRIEF OF THE STATE OF VERMONT AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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Appellees.

On Appeal from the Supreme Court of Pennsylvania

BRIEF OF THE STATE OF VERMONT AS AMICUS CURIAE IN SUPPORT OF APPELLEES

Pursuant to Rule 36 of the Rules of this Court, the State of Vermont, by its Attorney General, respectfully submits this brief as *amicus curiae* in support of appellees.

INTEREST OF THE AMICUS CURIAE

The State of Vermont imposes several taxes or fees upon motor carriers, in order to raise revenues necessary to construct and maintain the State's highways and roads, including: (1) a very high registration fee ($1,240 per year for large trucks)—one of the highest in the nation, and nearly double the national average—*charged only to trucks registered in Vermont*, (2) a purchase and use tax *charged only to trucks registered in*

Vermont, (3) a fuel-use tax, charged to trucks whether registered in Vermont or elsewhere, based on the miles those trucks report they have driven in Vermont, and (4) a $50 annual highway user fee, charged to all trucks weighing 18,000 pounds or more, whether registered in Vermont or elsewhere. The monies collected in all four categories go into a special fund used for highway construction and maintenance. The $50 user fee is presently being challenged in the Vermont courts by the American Trucking Associations, Inc. ("ATA"), the lead appellant in this case, as violative of the Commerce Clause. This Court's disposition of ATA's challenge to Pennsylvania's marker fee in the instant case may affect the disposition of the pending challenge to Vermont's user fee.

While Vermont's current user fee is, in the case of Vermont-registered trucks, superimposed upon unreduced registration fees, earlier Vermont laws had attempted to calibrate the user fee's application to compensate for the fact that Vermont-registered trucks alone bore the burden of Vermont's exceptionally high registration fee. For thirty years prior to 1982, the user fee was charged only to non-Vermont-registered trucks. The 1982 Act extended the user fee to Vermont-registered trucks as well, but reduced the registration fee in an equal amount. These earlier fees were challenged by ATA and held violative of the Commerce Clause by the Vermont Supreme Court. The correctness of those holdings is presently before this Court on Vermont's conditional cross-petition for writ of certiorari in No. 86-276, which we assume is being held pending resolution of the instant case. This Court's disposition of ATA's challenge to the axle tax in the instant case may affect the disposition of the conditional cross-petition in No. 86-276.

ARGUMENT

INTRODUCTION AND SUMMARY

In an unbroken line of cases spanning 70 years, this Court has held that states may, without offending the Commerce Clause, impose "flat taxes" on motor vehicles to finance highway construction and maintenance, so long as the taxes are reasonable in amount, imposed in equal amount on interstate and intrastate commerce, and the state's total taxing scheme is not shown to impose costs on out-of-state vehicles excessive in comparison to the governmental benefit conferred.[1] In 1950, this Court was asked to overturn that line of cases, but declined to do so, stating that "[i]f a new rule . . . is to be declared, we think Congress should do it." *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 547 (1950). At the time of that ruling, Congress had already "passed comprehensive legislation regulating interstate carriers in which it is declared that 'Nothing in this chapter shall be construed to affect the powers of taxation of the several States . . .'" *id.* at 547 n.8.

In recent years, Congress has moved affirmatively to exercise its power under the Commerce Clause to monitor state taxation of motor carriers in order to prevent discrimination against interstate commerce. Accordingly, it is all the more appropriate today that "if a new rule . . . is to be declared, . . . Congress should do it."

---

[1] See, *e.g.*, *Hendrick v. Maryland*, 235 U.S. 610 (1915); *Kane v. New Jersey*, 242 U.S. 160 (1916); *Aero Mayflower Transit Co. v. Georgia Public Service Comm'n*, 295 U.S. 285 (1935); *Dixie Ohio Express Co. v. State Revenue Comm'n*, 306 U.S. 72 (1939); *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939); *Aero Mayflower Transit Co. v. Board of Railroad Comm'rs*, 332 U.S. 495 (1947); *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950); *Evansville Airport v. Delta Airlines*, 405 U.S. 707, 715-17 (1972); *Massachusetts v. United States*, 435 U.S. 444, 463-64 (1978). See also, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621-22 & n.12 (1981).

In the Motor Carrier Act of 1980, Congress outlawed a particular form of state taxation—differential taxes on motor carrier property—that Congress determined "unreasonably burden and discriminate against interstate commerce," 49 U.S.C. § 11503a.[2] The Act stated that except for this restriction on property taxes, the Act "does not . . . affect the taxation power of a State over a motor carrier." 49 U.S.C. § 10521(b)(4). In a report accompanying the bill that became the 1980 Act, Congress made clear that it had determined *not* to place any restrictions at that time on state highway user taxes:

> The provisions of this section [§ 11503a] do not apply to that body of taxes known as highway user taxes that are levied on owners or operators of motor vehicles because of their use of public highways. These highway user taxes include, but are not limited to, motor fuel taxes, registration fees, drivers licenses, vehicle user taxes, ton-mile taxes, and other motor vehicle related taxes; the proceeds of these taxes, for the most part, are expended through a

---

[2] Section 11503a provides, in pertinent part:

> (b) The following acts unreasonably burden and discriminate against interstate commerce and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
>
> (1) assess motor carrier transportation property at a value that has a higher ratio to the true market value of the motor carrier transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property;
>
> (2) levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection;
>
> (3) levy or collect an ad valorem property tax on motor carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

> State highway fund or otherwise earmarked for highway construction, maintenance, or operation.

H. Rep. No. 96-1069, 96th Cong. 2d Sess., at 45 (1980).

Although placing no restrictions on state user taxes in the 1980 Act, Congress in that Act made a finding that state licensing and registration requirements lacked uniformity and were burdensome to motor carriers, and directed an Executive Branch study of how those requirements could be made "more efficient and equitable." P.L. 96-296, § 19 (1980).[3] Out of this direction emerged a Report To Congress in December, 1982, submitted by the Department of Transportation and the Interstate Commerce Commission.[4] The principal focus of the report was on the taxes imposed by states on motor carriers, and one of the findings was that the nonuniformity of regulation was largely a product of the multiplicity and variety of taxes the states imposed. The report detailed the complexities involved in trying to achieve greater uniformity of state taxation while at the same time en-

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[3] Section 19 provided:

> Congress hereby declares and finds that the individual State regulations and requirements imposed upon interstate motor carriers regarding licensing, registration, and filings are in many instances confusing, lacking in uniformity, unnecessarily duplicative, and burdensome and that it is in the national interest to minimize the burdens of such regulations while at the same time preserving the legitimate interests of the State in such regulation. Therefore, the Congress directs the Secretary of Transportation and the Interstate Commerce Commission, in consulation with the States and the various State agencies which administer such requirements and regulations and with the motor carrier industry . . . to develop legislative or other recommendations to provide a more efficient and equitable system of State regulations for interstate motor carriers. Such recommendations shall be made to the Congress not later than 18 months after the date of enactment of this Act.

[4] Department of Transportation and Interstate Commerce Commission, *Report to Congress, Uniform State Regulations, Motor Carrier Act of 1980, Section 19* (1982).

abling each state to secure the revenues it needs to maintain its highway system. The report canvassed a number of possible federal responses, ranging from no action to total federal preemption of the taxation of motor carriers. The report ultimately concluded:

> While the development of standards by the Federal Government has some benefits, state administrators are in a much better position to formulate standards to be implemented by the states. For this reason, it is recommended that a task force of state representatives responsible for registration, fuel taxes and third structure taxes be charged with defining uniform standards for state requirements imposed on motor carriers. [Report, p. 123.]

The report recommended further that Congress enact a law allowing the states two years to develop such standards, following which the Secretary of Transportation would be empowered to "promulgate a set of standards into law via the regulatory process," *id.*

The Administration proposed legislation implementing these recommendations in late 1983,[5] and hearings on these recommendations were conducted by Congress in late 1983 and early 1984.[6] At the 1983 hearings, representatives of the trucking industry announced that they were developing a competing proposal under which Congress would restrict the forms of state taxation without further delay.[7] That proposal was unveiled by ATA at

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[5] H.R. 4518, 98th Cong., 1st Sess. (1983).

[6] *Oversight of the Motor Carrier Act of 1980: Hearings Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation*, 98th Cong., 1st Sess. (1983); *Surface Transportation Issues: Hearings Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation*, 94th Cong., 2d Sess. (1984).

[7] *Oversight of the Motor Carrier Act of 1980, supra* n.6, at 279-80, 305-06, 311, 313.

the 1984 hearings.[8] Under ATA's proposal, Congress would prescribe standards for state taxation of motor carriers, prohibiting all forms of state taxation that did not conform to those standards. The standards would, *inter alia*, prohibit flat taxes. In explaining its proposal, ATA cited Pennsylvania's marker fee and axle tax as examples of what should be prohibited, advancing some of the same arguments as are now made in its brief to this Court.[9]

Representatives of the states opposed both the Administration's bill and ATA's proposal, urging that Congress withhold any legislation while the states undertook to develop more uniform standards of taxation.[10] Congress opted for the latter course, and the states, under the aegis of the National Governors' Association, are actively engaged in a program to develop uniform standards.[11]

The ongoing dialogue since 1980 between Congress, the pertinent agencies of the Executive Branch, the states, and the motor carrier industry, over how best to structure state taxation of motor carriers, has demonstrated that the problem is not susceptible to simple solution.[12] There are disagreements, *inter alia*, as to what

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[8] *Surface Transportation Issues*, *supra* n.6, at 1343-65, 1369-71.

[9] *Id.* at 1346-47, 1352, 1362, 1370.

[10] *Id.* at 1201-13, 1319-22, 1327-28.

[11] For a description of this program, see "An Experiment in Federalism: Can the States Improve the Interstate Motor Carrier Taxation System?", National Governors' Association Center for Policy Research, *Capital Ideas*, Feb. 1, 1986 (revised).

[12] Congress has encountered these same complexities in attempting to improve the system of *federal* taxes imposed on motor carriers, and has commissioned several Executive Branch studies in that context. See, *e.g.*, P.L. 97-424, 97th Cong., 2d Sess. § 513(g) (1982); P.L. 98-369, 98th Cong., 2d Sess. §§ 931, 933 (1984); *Final Report [to Congress] on the Federal Highway Cost Allocation System* (1982), by the U.S. Department of Transportation, Federal Highway Administration; *Report to Congress: Alternatives To Tax on Use of Heavy Trucks* (1984), by the U.S. Dept. of Transportation, Federal Highway Administration. See pp. 12-14, *infra*.

the trucking industry's share of highway costs should be, the feasibility of and administrative costs attendant to various suggested taxing schemes, the proper allocation of taxing responsibility between federal and state governments, and the ways in which the states' variegated needs (stemming from differences in climate, geography, traffic, and density of in-state truck registrants) all can be served.[13]

With the matter now squarely on Congress' agenda, ATA asks this Court to reverse 70 years of precedent and, by constitutional fiat, to remove flat taxes from the range of permissible measures by which states can meet their highway construction and maintenance needs. That invitation would be controversial, in the current context,

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[13] As examples of the varying state needs:

(1) Some states, like Vermont, are exposed to severe weather conditions and have generally mountainous terrains and many bridges, making road construction and repair costs per-mile higher than other states.

(2) States like Vermont that are geographically situated on routes that are heavily traveled by interstate carriers experience much heavier per-mile road damage by heavy trucks, and thus much higher costs of highway maintenance, than less heavily-trafficked states. As an example, Interstate 91, which is the principal artery linking eastern Canada with New England, runs the entire north-south length of Vermont. For most of its length, Interstate 91 is virtually on the border between Vermont and New Hampshire. But because it lies in Vermont, the cost of its maintenance falls on Vermont, not New Hampshire.

(3) States like Vermont that have relatively few trucks registered in-state in relation to total truck traffic on their highways (JA 198) cannot generate revenues from registration fees in the amounts available to states with higher density of in-state registrants. For example, while roughly 25% of the trucks traveling Pennsylvania's highways are registered in Pennsylvania (ATA Br. 33), less than 10% of the trucks traveling in Vermont are registered in Vermont.

A consequence of these combined factors is that Vermont is compelled to charge registration fees to Vermont-registered trucks that are nearly double the national average (JA 178).

even if the arguments advanced in its support were sound. The Constitution vests plenary authority in Congress to regulate interstate commerce, *Western & Southern L. I. Co.* v. *Bd. of Equalization*, 451 U.S. 648, 652-53 (1981); highway transport is a subject of continuous congressional oversight; Congress, since 1980, has demonstrated its preparedness to strike down state taxes imposed on the motor carrier industry when persuaded that there is discrimination against interstate commerce; and Congress has chosen to this point *not* to intervene with respect to state highway user taxes but instead to await state efforts at achieving greater uniformity. This is not, we submit, the time for judicial intervention through reversal of a doctrine that has stood for 70 years.

But even if this Court were prepared to intervene at this point upon a sufficient showing, ATA has not made that showing. Its arguments for overturning this Court's flat tax jurisprudence are unsound both in fact and in law. We demonstrate this at pp. 10-20, *infra*.

We then show, at pp. 20-24, that if this Court adheres to its existing flat tax decisions, Pennsylvania's marker fee and axle tax are valid. The marker fee is plainly within the ambit of those decisions. ATA contends that the axle tax is not, because, although it is imposed equally on in-state and out-of-state registrants, its enactment was accompanied by an equivalent reduction of the registration fee charged to in-state registrants and thus the entire brunt of the increase was visited on out-of-state registrants. That contention is fallacious, because it ignores that Pennsylvania had increased registration fees by more than the amount of the axle tax two years earlier. The effect on interstate commerce of the two enactments is no different than if Pennsylvania had in a single enactment left the registration fee unchanged and enacted the axle tax. If the latter would satisfy the Commerce Clause (and it would) the result cannot be different because Pennsylvania arrived at that result in two legislative steps rather than one.

I. THE REASONS ADVANCED BY ATA FOR OVERTURNING THIS COURT'S FLAT TAX DECISIONS ARE UNSOUND.

ATA contends that this Court's flat tax decisions "can no longer be regarded as controlling" (ATA Br. 41), both because the real world to which they apply has changed, and because this Court's understanding of the Commerce Clause has changed. We address these contentions in turn.

A. ATA's brief argues that the "critical" predicate for this Court's decisions upholding flat taxes was "concern about the feasibility of administering graduated highway taxes," ATA Br. 42. That concern, ATA's brief insists, no longer applies, and states can now without difficulty rely instead upon "a variety of mileage-related highway taxes" (*id.* 42). But in the dialogue now ongoing over proposed legislative solutions, ATA has asserted quite the opposite. There, it has declared that "the evidence is clear" that the costs to truckers and the public associated with administering mileage-related taxes are "outrageous" and disproportionate to the amounts collected. ATA's position, as articulated by the Director of its Department of Economics and Taxation, is as follows:

> Mileage or ton-mile taxes are self-reporting and depend upon those subject to the tax identifying themselves to the state. They are based on the honor system. Those who are honorable will pay the tax and the others will not.
>
> The only way to ensure compliance with such a tax is for the state to set up many "ports of entry" stations, including interior points, and to audit the records of the carrier. Oregon, for example, has 67 ports at which trucks must stop and be checked for compliance. . . .
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> • • • •

> Ton-mile and mileage taxes are also a substantial burden on the taxpayers. A study . . . found that carrier detention costs associated with stopping at a minimum of two ports of entry may equal or exceed the mileage tax fees imposed by the State. In addition, carriers incur the costs of additional record-keeping.
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> • • • •
>
> *The evidence is clear that motor carrier costs associated with* ton-mile and *mileage taxes are outrageous and frequently equal to or in excess of the taxes paid.*[14]

It was concerns such as those just quoted that impelled this Court in 1950 not to retreat from its validation of flat taxes, and to remand the carriers to Congress:

> Complete fairness would require that a state tax formula vary with every factor affecting appropriate compensation for road use. . . . Each additional factor adds to administrative burdens of enforcement, which fall alike on taxpayers and government. We have recognized that *such burdens may be sufficient to justify states in ignoring even such a key factor as mileage*, although the result may be a tax which on its face appears to bear with unequal weight upon different carriers. *Aero Transit Co. v. Georgia Comm'n*, 295 U.S. 285, 289. Upon this type of reasoning rests our general rule that taxes like that of Maryland here are valid unless the amount is

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[14] Reith, *Ton-Mile Taxes Revisited*, in AASHTO Quarterly, July 1984, at 14-15 (published by American Association of State Highway and Transportation Officials) (emphasis added). ATA also detailed the weaknesses of taxing schemes "depend[ent] on carriers 'declaring' the miles travelled by their vehicles" in *Comments of American Trucking Association on Study of A Federal Weight-Distance Truck Tax*, before the Federal Highway Administration, U.S. Dept. of Transportation, FHWA Docket No. 85-20 (Oct. 24, 1986), at S6-S7. ATA's view is shared by other representatives of the trucking industry. See, *e.g.*, AASHTO Quarterly, July 1984, at 11 (views of President of Owner-Operators Independent Drivers Ass'n of America).

> shown to be in excess of fair compensation for the privilege of using state roads. [*Capitol Greyhound*, 339 U.S. at 546-47, emphasis added, footnote omitted.]

This passage was quoted as authoritative in *Evansville Airport v. Delta Airlines*, 405 U.S. 707, 716-17 (1972) and in *Massachusetts v. United States*, 435 U.S. 444, 463-64 (1978), and in the latter decision the Court added this further observation:

> [E]ven when an annual flat fee results in some overcharges, the . . . [alternative proposed] solution would often increase the fiscal burden on [those [taxed]. If the [taxing authority] were required more precisely to calibrate the amount of the fee to the extent of the actual use of the airways, administrative costs would increase and so would the amount of revenue needed to operate the system. The resulting increment in a [taxpayer's] actual fair share might well be greater than any overcharge resulting from the present fee system. [435 U.S. at 466.]

This is, as we understand it, precisely the point that ATA's Director of Economics and Taxation has declared to be equally true today (pp. 10-11, *supra*).

That there remains "concern about the feasibility of administering graduated highway taxes" (ATA Br. 42) is perhaps most clearly evidenced by Congress' choices to date in structuring the *federal* heavy vehicle use tax. To date, Congress has imposed a flat weight-based tax—*e.g.*, $550 per year for every truck of 75,000 pounds or more—regardless of miles driven. 26 U.S.C. § 4481(a). But Congress knows that there is enormous variation in the number of miles driven by such trucks, 25% traveling less than 40,000 miles per year while another 25% travel over 100,000 miles per year.[15] As this is a use tax, designed to raise revenues for highway repair, the disproportionately high per-mile cost for low-mileage trucks

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[15] *Report to Congress: Alternatives To Tax on Use of Heavy Trucks*, *supra* n.12, at IV-4; see also, *id.* at IV-10.

has been seen as an inequity.[16] But the federal flat tax has been rationalized as follows:

> Many compromises must be made in developing an acceptable set of user charges . . .
>
> * * * *
>
> The uniform and simple user charges required by administrative necessity may result in less than ideal equity and efficiency. Equity, efficiency, and a desired revenue yield can be achieved only to the extent user charges are effective in collecting from the motorists their cost responsibilities. Therefore, payment ease, administrative feasibility, and the level of compliance are just as critical to the attainment of the first three objectives as an empirically correct and precise calculation of the cost responsibilities. Without universal application and collection, even the theoretically most equitable and efficient tax structure will not be fair and will not raise the required revenues.[17]

In 1982, Congress commissioned a study by the Department of Transportation of the feasibility of switching to a tax that would vary not only with the weight of the truck but also with miles driven. P.L. 97-424, § 513(g). The Department's report, submitted in January, 1984, concluded that a weight-distance tax "would be a major modification to current administrative practices, and the cost implications are uncertain."[18] The Department explained:

> The additional component, mileage, is the key administrative cost variable for this alternative. How the mileage is reported and the degree to which it can be verified will determine the administrative cost.[19]

While believing that "weight-distance tax schemes hold a great deal of promise for simpler, more equitable user

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[16] *Id.* at I-1.

[17] *Id.* at V-3.

[18] *Id.* at VII-10.

[19] *Id.* at VII-10.

charge structures *over the long-term*" [20], the Department ended its report with this equivocal conclusion:

> The Department believes that application of a weight-distance tax instrument at the Federal level may be possible at some time in the future, depending on the results of further analysis. The Department will continue to investigate potential benefits and problems of a weight-distance tax with an eye to its future use as a major component of the highway user charge structure.[21]

Congress reacted by commissioning another study, "to evaluate the feasibility and ability of weight-distance truck taxes to provide the greatest degree of equity among highway users," the study to include "an evaluation of the evasion potential for weight-distance taxes." P.L. 98-369, § 933 (1984). The Department of Transportation's report to Congress on this study is due by October, 1987, *id.* § 934.

Congress' caution respecting a *federal* mileage-based tax establishes *a fortiori* the uncertain reliability of *state* mileage-based taxes. For a *federal* mileage-based tax could be audited simply by periodic readings of a truck's odometer.[22] Such readings, however, could not inform a state as to the number of miles driven in that state.

In sum, deciding whether states should be relegated to depending entirely upon mileage-based taxes requires a balancing of policy considerations and the resolution of difficult fact questions. How reliable can collection of mileage-based taxes become, and what are the administrative costs necessary to achieve that reliability? Is it worth undertaking (or imposing) those costs to eliminate the potential inequities of flat taxes? And, above all, what is the real extent of those potential inequities, given

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[20] *Id.* at VII-11 (emphasis added).

[21] *Id.* at VIII-3.

[22] *Id.* at VII-11.

that flat taxes invariably are but a small component of a state's multifaceted tax structure in which in-state trucks pay registration fees that are not charged to out-of-state trucks, and all trucks are charged fuel-use taxes that (however unreliable their collection) *are* mileage-based?

Congress, which can conduct public hearings and direct studies by the Executive Branch, is far better situated than this Court to weigh and resolve these policy and factual issues. Where sound decision turns on "the kind of investigation, examination and study that legislative bodies can provide and courts cannot," the matter is better left to Congress to resolve. *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980). See also, *Steelworkers v. Bouligny, Inc.*, 382 U.S. 145, 152-53 (1965); *United States v. Topco Associates*, 405 U.S. 596, 609-12 (1972); *Texas Industries, Inc. v. Radcliff*, 451 U.S. 630, 646-47 (1981).

Certainly, the sole evidence that ATA proffers in its brief as the predicate for judicial dictation of exclusively mileage-based tax systems—that every state now imposes a mileage-related fuel-use tax as *one* component of its multi-tiered tax structure (App. 39, 42)—is not dispositive of how the balance should be struck. A substantial segment of America's trucking industry does not report mileage under these fuel use tax schemes,[23] and with respect to those trucks which do report, each state's knowledge of the miles actually driven in that state is dependent on self-reporting by the trucking companies, "the honor system" (*supra*, p. 10).[24] That states obtain a *portion*

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[23] "Based on existing state requirements, it is estimated that about 85 percent of all trucks weighing 50,000 pounds or more report mileage"; "[v]ehicles below this weight threshold do not normally report their mileage to any authority, and it is likely that such mileage records are not maintained." Druhan, *Federal Weight-Distance Tax*, in AASHTO Quarterly, July 1984 (*supra*, n.14) at 7.

[24] Pennsylvania legislators, in the deliberations leading to adoption of the marker fee, noted the enforcement problems Pennsyl-

of the revenues they need for highway construction and maintenance in this unreliable manner should not mean that, as a matter of constitutional dictate, they must depend on this for the *entirety* of their revenues from trucks registered out-of-state.

Moreover, ATA's suggestion that the present-day imposition of mileage-based taxes by states is a *new* development that should alter this Court's view toward flat taxes founders on the additional fact that the development is *not* new. Indeed, in *Capitol Greyhound*, this Court upheld a flat tax notwithstanding that the state also charged a mileage tax, 339 U.S. at 546. The existence of the latter was cited by this Court not as a ground for invalidating the flat tax, but rather as a ground for upholding it: the mileage tax ameliorated any potential inequity that out-of-state vehicles might suffer from a

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vania was encountering in attempting to collect its mileage-based fuel-use tax (J.A. 118-20). Vermont's system for collecting its mileage-based fuel-use tax reflects the problems inherent in enforcing such taxes. Today's large trucks can travel up to 800 miles without refueling. It is thus a matter of chance (from Vermont's standpoint) whether a truck traveling through Vermont stops to purchase fuel in Vermont. If it *does*, Vermont collects a tax at the pump. Of course, some of that fuel—probably most—will actually be used in other states. And if the truck does *not* purchase fuel in Vermont, Vermont receives no tax at the pump.

Vermont requires trucking companies to report quarterly the number of miles their trucks have driven in Vermont. If the number of miles reported is less than would justify the tax Vermont has collected at the pump from that company, Vermont refunds the excess. If the number of miles reported warrants a tax that is higher than the amount Vermont has collected at the pump, the company must remit the balance with its report.

As is evident, the amount Vermont ultimately collects from a trucking company is wholly dependent on the company's self-reporting as to the number of miles it has driven in Vermont. For Vermont to vigorously police the reliability of these reports—either through actual monitoring of trucks on its highways or through post-filing audits (most of which would have to be conducted in distant states)—would be enormously expensive.

flat tax alone. *Id.* See also, *Evansville Airport*, 405 U.S. at 716 ("That toll [in *Capitol Greyhound*] was supplemental to a standard mileage charge imposed by the State, so that 'the total charge as among carriers [did] vary substantially with the mileage traveled.' ").

B. ATA contends that the world has changed in yet another way: interstate trucking is now dominated by large, nationwide trucking companies (ATA Br. 43-45), and if flat taxes were implemented in all states the cumulative burden on such companies would be prohibitive (*id.* 35-37). For several reasons, this does not constitute justification for overturning this Court's flat tax jurisprudence.

First, the concern is wholly theoretical. Flat taxes have been held constitutional for over 70 years—Vermont, for example, has imposed a flat tax on trucks for at least 60 years—yet there are only seven states that impose flat taxes on trucks. Not surprisingly, these are states with unique revenue problems respecting the construction and maintenance of their highways that are not shared by the majority of states. Vermont's dilemma is described at p. 8, n.13, *supra*. Pennsylvania's brief describes its unique circumstances, which are similar.

Second, were the theoretical concern ever to become a real one, it is inevitable that Congress would act promptly to solve the problem. As we have described, the subject of state use taxation of the motor carrier industry is squarely in Congress' focus, and Congress has shown that it will act when convinced that states have adopted truck taxes that "unreasonably burden and discriminate against interstate commerce." 49 U.S.C. § 11503a(b).

Third, and most important, the flat tax doctrine has a built-in protection against the phenomenon ATA conjectures: a flat tax will be invalidated if the amount is shown to be "excessive in comparison with the govern-

mental benefit conferred." *Evansville Airport*, 405 U.S. at 717. See also, *Capitol Greyhound*, 339 U.S. at 547. In the *absence* of such a showing, this Court has held that flat taxes are not to be invalidated on the basis of conjecture that they might proliferate and render the cost of transportation prohibitive. *Evansville Airport*, 405 U.S. at 721-22. ATA has not even attempted, in its challenges to the Pennsylvania and Vermont taxes, to show that they are excessive in comparison with the benefit conferred, for the evident reason that these states plainly need the revenues in question to meet their unusually high per-mile highway maintenance and construction costs. On the other hand, were other states, whose revenue needs are already met without flat taxes, to adopt such taxes on top of their existing tax structures, those taxes *would* be vulnerable to a showing that they exceeded fair compensation.[28]

Finally, that the trucking industry is now dominated by large, nationwide companies means that the problem—if one exists—is not of the type that customarily has commanded concern under the discriminatory tax doctrines evolved by this Court. Those doctrines have been designed to prevent states from creating "preferential trade areas," *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981), through the enactment of taxes that "favor local enterprises at the expense of out-of-state businesses," *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977). The nationwide trucking firms, however, have terminals in numerous states, and, as many states do not even require a terminal as a condition of registration, these firms are free to register their trucks virtually where they please, indeed to register

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[28] This consideration is an answer, as well, to ATA's concern respecting retaliatory taxes (ATA Br. 37-39). It is evident that any state that, by imposing retaliatory taxes, increased its charges to an amount exceeding fair compensation, would be vulnerable to invalidation of the tax under the flat tax decisions.

some trucks in one state and others in others.[26] ATA's depiction of Pennsylvania-registered trucks as "Pennsylvania-based" thus is artificial: trucking companies engage in registration "shopping."[27] While, theoretically, states might use their tax structures as a means to encourage trucks to *register* there rather than elsewhere, it is certain that that is neither the purpose nor the effect of the Pennsylvania and Vermont tax structures. For both states have *registration* fees that far exceed the national average (JA 178), that dwarf in impact any incremental disadvantage suffered by out-of-state registrants from the flat taxes, and that thus render these states uniquely undesirable as choices for registration.

C. ATA's effort to discern a change in the law that justifies overturning the flat tax decisions is equally unavailing. There has, to be sure, been a change in this Court's analysis of *general revenue* taxes—a change that began before, and was memorialized in, *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). That change was designed to make it *easier*, not *harder*, for states to validate such taxes, *id.* at 288-89. But the more important point is that that line of decisions is not applicable in evaluating user fees of the type involved here. As this Court explained in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621-22 & n.12 (1981):

> The Montana Supreme Court held that the coal severance tax is 'imposed for the general support of the government' . . ., and we have no reason to question this characterization of the Montana tax as a general revenue tax. *Consequently, in reviewing appellants' contentions, we put to one side those cases in which the Court reviewed challenges to "user" fees or "taxes" that were designed and de-*

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[26] JA 189-81.

[27] JA 189-91, 158-60, 181-82; *Report to Congress, Uniform State Regulations*, *supra* n.4, at 11.

fended as a specific charge imposed by the State for the use of state-owned or state-provided transportation or other facilities and services. See, e.g., Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972); *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939); *Ingels v. Morf*, 300 U.S. 290 (1937).[12]

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[12] As the Court has stated, "such imposition, although termed a tax, *cannot be tested by standards which generally determine the validity of taxes.*" *Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183, 190 (1931). . . . [Emphasis added; one footnote omitted.]

Each of the decisions cited in this passage involved a flat tax imposed on transportation. The flat tax decisions have elaborated a set of applicable considerations that differ somewhat from those applied to general revenue taxes, reflecting the different nature of user fees. Not surprisingly, this Court's most recent user fee decisions—which even ATA concedes post-date the change in the law respecting general revenue taxes (ATA Br. 48-49)—rely extensively on the earlier flat tax decisions in evaluating the validity of the fees under challenge, and do not cite a single general revenue decision as pertinent to that analysis. *Evansville Airport*, 405 U.S. at 715-720; *Massachusetts v. United States*, 435 U.S. at 463-67. Conversely, *Complete Auto Transit*, in describing the run of cases it was attempting to harmonize, cited only general revenue cases and not a single flat tax case, 430 U.S. at 278-89. There has, in sum, been no change in this Court's decisional law that undercuts in any way the vitality of the flat tax decisions.

II. PENNSYLVANIA'S MARKER FEE AND AXLE TAX ARE NOT INVALID UNDER THIS COURT'S FLAT TAX DECISIONS.

In Part I, we have shown that this Court's flat tax decisions should not be overturned. We now address the application of those decisions to the marker fee and axle tax challenged in this case.

A. The Marker Fee.

There can be little question but that the $25 marker fee that was in effect in Pennsylvania from 1981 to 1983 was valid under this Court's flat tax decisions. It was modest in amount, and was charged equally to Pennsylvania registrants and out-of-state registrants.[28] Although ATA analyzes the marker fee as though it were the sole charge imposed by Pennsylvania for the use of its highways, in fact it constituted a tiny component of a taxing scheme whose principal burdens were placed on Pennsylvania-registrants alone (the registration fee) and on all truck-users on a mileage basis (the fuel tax). The disparities that ATA depicts by looking solely at the marker fee are less dramatic than those that were shown in *Capitol Greyhound*, 339 U.S. at 546, but as the Court there noted, that is not in any event the proper perspective from which to assess the validity of the fee:

> [I]t should be noted that the total charge of Maryland for the privilege of using its roads will not show the same disparity among carriers. For Maryland also charges a mileage tax, and this tax added to the . . . [challenged] tax is what Maryland actually charges for its road privileges. Thus the total charge as among carriers does vary substantially with the mileage traveled. [*Id.* at 546, footnote omitted.]

See also, *Evansville Airport*, 405 U.S. at 715-16; *Massachusetts v. United States*, 435 U.S. at 467-70. Finally, ATA does not contend that Pennsylvaia's total taxing scheme, including the marker fee, imposed costs on out-

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[28] ATA points out that "[f]or trucks registered in Pennsylvania, the fee was 'deemed a part of and included in the vehicle registration fee'" (ATA Br. 4). But ATA attaches no legal significance to this fact, and for an obvious reason: the law creating the marker fee, and containing this declaration, simultaneously increased the registration fee schedule in amounts far exceeding the amount of the marker fee (from $45 to $228, depending on the weight of the truck). See J.S. App. 7a.

of-state trucks "excessive in comparison with the governmental benefit conferred." *Evansville Airport*, 405 U.S. at 717; see also, *Capitol Greyhound*, 339 U.S. at 547.

At bottom, ATA argues nothing more than that the marker fee viewed in isolation—a small component of the total taxing scheme—cost *on average* more on a per-mile basis for out-of-state registrants than for in-state registrants. But that, of course, is precisely the argument this Court has held legally insufficient in its unbroken line of flat tax decisions.

B. The Axle Tax.

Although Pennsylvania imposed the axle tax equally on in-state and out-of-state registrants, ATA contends that the tax cannot be evaluated by traditional flat tax jurisprudence, because Pennsylvania simultaneously reduced its registration fees by the amount of the axle tax. This means, ATA contends, that the Pennsylvania scheme is discriminatory because it "effectively" visits the entire brunt of the increase on out-of-state registrants (ATA Br. 16).

ATA's contention is fallacious, because it focuses on a single frame of a moving picture. In 1980, Pennsylvania raised its registration fees by amounts exceeding the amount of the later axle tax, without imposing an equivalent burden on out-of-state registrants. When, in 1982, Pennsylvania adopted the axle tax, it rolled back the amount of its registration fees by the amount of the axle tax. The net effect of these two actions was no different than if Pennsylvania had adopted the axle tax in 1980, and simply not raised the registration fees in that amount (except, of course, that the latter course would have visited the axle tax on out-of-state registrants two years earlier). If Pennsylvania had followed the latter course, ATA would have had no "effective discrimination" claim; that course would have represented the simple adoption of a flat tax applied equally to in-state and

out-of-state registrants. And if Pennsylvania had adopted the axle tax in 1980, that tax would have been valid under the decisional law already discussed, particularly as ATA does not contend that it results in total charges to out-of-state registrants "excessive in comparison with the governmental benefit conferred." *Evansville Airport*, 405 U.S. at 717.[29]

The impact on interstate commerce of Pennsylvania's present tax scheme is no different than the impact had Pennsylvania enacted that scheme in one step rather than two. And, as ATA itself recognizes elsewhere in its brief (ATA Br. 42), but studiously avoids in the portion addressing the point just made (*id.* at 26-27), the Commerce Clause is concerned with the substantive effect of state tax laws on interstate commerce, not their form. It is simply not conceivable that if Pennsylvania's tax scheme does not burden or discriminate against interstate commerce, it could be held offensive to the Commerce Clause because arrived at in two steps rather than one. In ATA's words, "This Court's recent decisions have moved away from such empty fictions, which serve 'only as a rule of draftmanship' . . . , and instead look to the 'economic realities' . . . of the challenged tax" (*id.* at 42).[30]

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[29] To be sure, the axle tax is larger in nominal dollars than flat fees this Court has approved before. But it is not larger in *real* dollars. In *Dixie Ohio Express Co. v. State Revenue Comm'n*, 306 U.S. 72, 74 (1939), this Court upheld an annual flat tax of $75 on two-ton trucks. See also, *Capitol Greyhound*, 339 U.S. at 546; *id.* at 559, 561 (dissenting opinion of Frankfurter, J.) Pennsylvania's axle tax, which applies only to trucks weighing 12 tons or more, is at its highest $180, far less in real today than $75 in 1939, indeed, less than $25 in 1935, as Pennsylvania's brief shows.

[30] ATA analyses the axle tax issue as though Pennsylvania, after a long period of static highway taxes, suddenly introduced a new tax applicable solely to out-of-state registrants. We have shown

CONCLUSION

For the reasons set forth above, the judgment of the Supreme Court of Pennsylvania should be affirmed.

Respectfully submitted,

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in text that that is not this case. But even if it were, on the record here such a tax would be valid.

States are not stuck forever with the relative burdens they happen to have imposed in the past on in-state and out-of-state registrants. If out-of-state registrants have been receiving a "free ride," states may act to impose a charge comparable to that already paid by in-state registrants. *Henneford v. Silas Mason Co.*, 300 U.S. 577, 583-87 (1937); *Alaska v. Arctic Maid*, 366 U.S. 199, 204-05 (1961). Here, the Supreme Court of Pennsylvania deemed the axle tax's cost to out-of-state registrants to be "compensatory" for the registration fees borne by in-state registrants alone. J.S. App. 33a-34a. ATA protests that Pennsylvania cannot "compenate" for the registration fees, because it has entered into reciprocity agreements with other states providing mutual waivers of registration fees (ATA Br. 23). This argument might have force if all states had the same registration fees. But the reality is that Pennsylvania's registration fee just prior to adopting the axle tax was more than $400 higher than the average of the states with which it had reciprocity agreements (see J.A. 178, which shows, for Pennsylvania, the fee *after* the $180 reduction upon adoption of the axle tax). Thus, Pennsylvania-registered trucks were paying $400 more for the use of Pennsylvania's highways than out-of-state registrants, even on the understanding that the latter's registration fees to their own states were payments for the use of Pennsylvania's highways.